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The Public Policy Exception to the Enforcement of Forum Selection Clauses

Michael Mousa Karayanni

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I. INTRODUCTION

A contractual stipulation determining a forum in which parties wish to litigate future disputes, commonly referred to as a forum selection clause,[1] serves a number of laudable interests. The clause provides certainty and predictability as to the place of litigation.[2] By designating a certain forum, parties will be able to choose a court which is both convenient and expert.[3] Additionally, the clause brings economic advantages to the contractual parties and the courts. Parties know where their recourse lies should a disagreement arise and, therefore, are able to take into consideration the cost of prospective litigation when negotiating the value of the contract.[4] As recently noted by the

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** Teaching Assistant, The Hebrew University of Jerusalem Faculty of Law. LL.B., Bar-Ilan University, Israel, 1990, LL.M., The George Washington University National Law Center, 1994, Dr. Jur. (candidate), The Hebrew University of Jerusalem. The author wishes to thank Professor Ralph G. Steinhardt of The George Washington University National Law Center who supervised the thesis. The author also wishes to thank Professors Stephen Goldstein and Celia Wasserstein Fassberg of The Hebrew University Faculty of Law, and Mr. John L. Habib, Esq. and Mr. Khalid M. Rabbani, Esq. for their helpful comments, support and encouragement.

1. A forum selection clause is also referred to by a number of terms, such as "forum selection agreement," "forum clause," "choice of forum agreement" and "jurisdiction agreement." *See* M. Richard Cutter, *Comparative Conflicts of Law: Effectiveness of Contractual Choice of Forum*, 20 TEX. INT'L L.J. 97, 98 n.3 (1985) (citations omitted). These terms will be used interchangeably throughout this article.

Different terms are also used to describe the court selected by the parties. Such a court can be referred to as a "selected forum/court," a "contractual forum/court" and a "designated forum/court." Henceforth, these terms are also used interchangeably. A court not designated by the parties will be referred to as the "noncontractual forum/court."

2. James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 2-3 (1976).

3. Gilbert, *supra* note 2, at 3.

4. *See* Omron Healthcare, Inc. v. Maclaren Exports Ltd., 28 F.3d 600, 604

United States Supreme Court, by giving effect to forum agreements, a court is spared the burden of pretrial motions to determine the correct forum, thereby conserving judicial resources.[5] Some have also suggested that forum agreements have a role in advancing harmony in international trade law,[6] and in promoting comity and respect toward other jurisdictions.[7]

Although the idea embodied in a forum agreement seems simple and serves a number of praiseworthy interests, until recently American courts almost unanimously held such clauses to be invalid as against public policy.[8] The reason frequently given for this public policy objection was that it is not a matter for the parties to a forum agreement to regulate the jurisdiction of courts; this matter was considered to lie solely within the legislature's domain.[9] Therefore, public policy did not tolerate a

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(7th Cir. 1994) (a party agreeing to litigate abroad is presumed to have received some compensation for the risk); Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1363 (2d Cir.) (forum agreements should principally be enforceable because the financial effect of a forum selection clause will be reflected in the value of the contract) (citations omitted), *cert. denied*, 114 S. Ct. 385 (1993).

5. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593-94 (1991). However, the considerable number of cases dealing with the effectiveness of forum agreements undermine the Court's assessment. Instead of dealing with pretrial motions as to whether a court has jurisdiction, courts are being constantly called upon to determine whether the jurisdiction agreement should be disregarded given the special circumstances of the case. *Carnival Cruise* is an example. *See* David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785 n.3 (1993) (in light of the amount of litigation considering the enforcement of forum agreements, the goal of reducing litigation costs and reserving judicial resources is illusory).

6. Ingrid M. Farquharson, *Choice of Forum Clauses—A Brief Survey of Anglo-American Law*, 8 INT'L L. 83, 100 (1974).

7. *Roby*, 996 F.2d at 1363.

8. *See generally* Willis L. M. Reese, *The Contractual Forum: Situation in the United States*, 13 AM. J. COMP. L. 187 (1964); Kurt N. Nadelmann, *Choice of Court Clauses in the United States: The Road to* Zapata, 21 AM. J. COMP. L. 124 (1973); William E. Syke, Comment, *Agreement in Advance Conferring Exclusive Jurisdiction on Foreign Courts*, 10 LA. L. REV. 293 (1950).

9. The American case widely cited as the first to invalidate forum agreements as against public policy was Nute v. Hamilton Mutual Ins. Co., 72 Mass. (6 Gray) 174 (1856). The forum selection clause in *Nute* was contained in an insurance policy and provided: "[T]he assured may . . . bring an action at law against the company [the insurer] for the loss claimed, which action shall be brought at a proper court in the county of Essex [Massachusetts]." The action brought by the insured was initiated, however, in a Suffolk County court. The Supreme Judicial Court of Massachusetts gave two closely related reasons for its ruling. First, the court explained, a stipulation specifying a court in which an action is to be commenced is one of "remedy." Therefore, the court concluded, a matter of remedy "does not depend on contract," rather, it is a matter "created and regulated by law." *Nute*, 72 Mass. (6 Gray) at 180-81. This reasoning was buttressed by "considerations of public policy." *Id.* at 184. In this context, the court noticed that in determining where actions may be brought, the legislature must have already taken into consideration notions of "general convenience and expediency." *Id.* If litigants, by agree-

clause intended to "oust" courts of their lawfully conferred jurisdiction.[10] In some instances, however, courts were motivated by practical concerns when they invalidated forum clauses.[11]

In 1972, the Supreme Court took an important step toward the validation of forum selection clauses in *The Bremen v. Zapata Off-Shore Co.*[12] In *The Bremen*, an all-embracing attitude of mistrust to choice-of-forum agreements was replaced by one favoring party autonomy regarding the means of dispute resolution.[13] In the course of its decision, the Court stated that "[t]he argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vesti-

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ment, were able to alter the legislature's jurisdictional scheme, "the symmetry of the law" would be disturbed. *Id.*

Other courts followed this reasoning and held forum selection clauses void for infringing legislative powers to regulate jurisdiction. *See, e.g.*, Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180, *reh'g denied*, 359 U.S. 999 (1959); Matt v. Iowa Mut. Aid Ass'n, 46 N.W. 857 (Iowa 1890); Benson v. Eastern Bldg. & Loan Ass'n, 66 N.E. 627 (N.Y. 1903); Gaither v. Charlotte Motor Car Co., 109 S.E. 362 (N.C. 1921); Healy v. Eastern Bldg. & Loan Ass'n, 17 Pa. Super. 385 (1901); International Traveler's Ass'n v. Branum, 212 S.W. 630 (Tex. 1919); Savage v. People's Bldg., Loan & Sav. Ass'n, 31 S.E. 991 (W. Va. 1898); *Cf.* Insurance Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (a citizen "cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."); Meacham v. Jamestown E&L R.R., 105 N.E. 653, 656 (N.Y. 1914) (Cardozo, J., concurring) ("The jurisdiction of our courts is established by law, and is not to be diminished, any more than it is to be increased, by the convention of the parties.").

But see Daley v. People's Bldg., Loan & Sav. Ass'n, 59 N.E. 452, 453 (Mass. 1901) (enforcing a forum agreement in a shareholder certificate designating another state court because when entering the agreement, the parties were standing in an equal position and neither had an oppressive advantage or power); Greve v. Aetna Live-Stock Ins. Co., 30 N.Y.S. 668, 669, 670 (Sup. Ct. 1894) (a forum clause designating another court in the same state is not manifestly against public policy).

10. *See* R. D. Hursh, Annotation, *Validity of Contractual Provision Limiting Place of Court in Which Action May be Brought*, 56 A.L.R.2d 300, 304 (1956).

11. *See* Otero v. Banco De Sonora, 225 P. 1112 (Ariz. 1924); Soliosberg v. New York Life Ins. Co., 217 N.Y.S. 226, 229 (App. Div. 1926) (maintaining the action in a court in the Soviet Union would bring difficulty in pleading and proof).

12. 407 U.S. 1 (1972).

13. *The Bremen*, 407 U.S. at 10. *See also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 518 (1974) (enforcing an arbitration clause referring an American plaintiff, and its Securities Exchange Act claim, to arbitration in France).

The Bremen was followed by considerable commentary welcoming the decision. *See, e.g.*, Fredrich K. Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 WAYNE L. REV. 49 (1972); Lawrence Collins, *Choice of Forum and the Exercise of Judicial Discretion—The Resolution of an Anglo-American Conflict*, 22 INT'L & COMP. L.Q. 332 (1972); Nadelmann, *supra* note 8; Willis L. M. Reese, *The Supreme Court Supports Enforcement of Choice-of-Forum Clauses*, 7 INT'L LAW. 530 (1973); George Delaume, *Choice of Forum Clauses and the American Forum Partiae; Something Happened on the Way to the Forum:* Zapata *and* Silver, 4 J. MAR. L. & COM. 295 (1973).

gial legal fiction."[14] The Court characterized the problem, posed by forum agreements, as concerning a court's discretion whether to exercise its jurisdiction given the existence of a forum selection clause.[15]

The Court's decision in *The Bremen* had significant impact on the course taken by courts when faced with a forum agreement.[16] Today, very few jurisdictions still adhere to the old rule invalidating such clauses.[17]

In *The Bremen*, the Court not only put forward strong policy considerations in favor of enforcement of forum selection clauses,[18] but it also managed to outline in broad terms circumstances in which a court might not enforce such clauses. The Court deemed fraud, undue influence, overwhelming bargaining power, and in some instances, the designation of a seriously inconvenient forum, to be sufficient grounds to invalidate forum selection clauses.[19]

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14. *The Bremen*, 407 U.S. at 12.

15. *Id.*

16. Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After* Carnival Cruise: *A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 65 (1992) (*The Bremen* was generally followed in federal as well as state courts); Linda S. Mullenex, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 315 (1988) (calling *The Bremen* a lodestar for lower federal courts); Leandra Lederman, Note, *Viva* Zapata*!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 431 (1991) ("*The Bremen* sparked an overreaction, resulting in excessive enforcement of forum selection clauses.").

However, it should be noted that some courts validated forum agreements some time before the Court handed down its decision in *The Bremen*. *See* Central Contracting Co. v. Maryland Casualty Co., 367 F.2d 341 (3d Cir. 1966); Wm. H. Muller & Co. v. Swedish Am. Line Ltd., 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955), *overruled by* Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967); Central Contracting Co. v. C. E. Youngdahl & Co., 209 A.2d 810 (Pa. 1965).

See also Willis L. M. Reese, *The Model Choice of Forum Act*, 17 AM. J. COMP. L. 292 (1969); RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 80 (1971); Willis L. M. Reese, *A Proposed Uniform Choice of Forum Act*, 5 COLUM. J. TRANSNAT'L L. 193 (1966).

17. *See* Redwing Carriers, Inc. v. Foster, 382 So. 2d 554 (Ala. 1980); Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432 (Iowa 1982).

18. The Court emphasized the need of tolerance, and in a sense, comity to foreign jurisdictions. The Court stated:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our own laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

The Bremen, 407 U.S. at 9.

19. *The Bremen*, 407 U.S. at 12, 16-17. With respect to a seriously inconvenient forum, the Court drew the distinction between a situation in which the parties contemplated the alleged inconvenience at the time the agreement was negotiated and a situation where the inconvenience is a result of circumstances which were not

Despite the policy considerations in favor of enforcement of forum clauses, as preached in *The Bremen*, and the Court's effort to narrowly limit the exceptions to their enforcement, the Court was not ready to put public policy to rest. A forum selection clause would not be enforced when "enforcement would contravene a strong public policy of the forum in which suit is brought."[20] However, public policy did not dictate the rule. Rather, it was perceived as an exception only to a general rule favoring enforcement of forum selection clauses.

The purpose of this article is three-fold. First, it attempts to define the scope of the public policy exception to the enforcement of forum clauses. Second, the article seeks to identify the major factors influencing the application of the exception. Third, it is hoped that after identifying the scope of the public policy exception and the factors influencing its application, public policy, at least in the context of forum clauses, will no longer be viewed as elusive and vague.

II. PUBLIC POLICY AS A LEGAL DOCTRINE AND AS AN EXCEPTION

A. Public Policy: General Principles

It is hard to find a legal doctrine, such as pubic policy, which has endured extensive criticism and survived.[21] The most famous and widely quoted criticism of public policy is found in the

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present at the negotiation stage. *Id.* at 16. In the first instance, the Court stressed: "[I]t is difficult to see why any such claim of inconvenience should be heard." *Id.* In the second instance, however, it is presumed that a more tolerable approach might be anticipated from the bench. *See, e.g.*, McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341, 345-46 (8th Cir.), *cert. denied*, 474 U.S. 948 (1985) (the Islamic revolution in Iran rendered litigation there seriously inconvenient for an American who negotiated the forum agreement before the occurrence of the revolution).

20. *The Bremen*, 407 U.S. at 15.

21. *See generally* Arthur Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027 (1940); Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956); Gary J. Simson, *The Public Policy Doctrine in the Choice of Law: A Reconsideration of Older Themes*, 1974 WASH. U. L.Q. 391 (1974); Kent Murphy, *The Traditional View of Public Policy and Ordre Public in Private International Law*, 11 GA. J. INT'L & COMP. L. 591 (1981); PCA Snyman, *Public Policy in Anglo-American Law*, 19 COMP. & INT'L L.J. S. AFR. 220 (1986); Holly Sprague, Comment, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CAL. L. REV. 1447 (1989).

At common law, the origins of the doctrine are traced back to the fifteenth century. *See* W. S. M. Knight, *Public Policy in English Law*, 38 L.Q. REV. 207 (1922). However, in civil law countries the doctrine only managed to emerge in the nineteenth century. *See* Gerhart Husserl, *Public Policy and Ordre Public*, 25 VA. L. REV. 37 (1938).

old English case of *Richardson v. Mellish*,[22] in which Judge Burrough observed: "I protest arguing too strongly upon public policy. It is a very unruly horse and once you get astride it, you never know where it will carry you."[23] Similar characterizations were heard in America.[24] The apparent reason for this criticism is the doctrine's vagueness, unpredictability, and uncertainty in application. Nonetheless, the doctrine pushed its way into modern doctrines[25] and went on to play an active role in two major fields of law—contracts[26] and the conflict-of-laws.[27] In contracts, public policy has been the basis for invalidating contractual provisions that were against a forum's public policy. Rights and obligations based on gambling and prostitution agreements, for example, were held to be invalid on public policy grounds.[28] In the conflict-of-laws context, the operation of the doctrine is somewhat indirect. Public policy comes into play only after the choice-of-law rules have dictated the application of foreign law to the controversy,[29] which according to the forum's standards "[w]ould violate some fundamental principle of justice, some prevailing conception of good morals, some deep-rooted tradition of the common weal."[30] Claims based on unreasonable restraints of marriage[31] or racially discriminating laws, for instance, will not be recognized because they are against public policy.[32]

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22. 130 Eng. Rep. 294 (Ex. 1824).

23. *Richardson*, 130 Eng. Rep. at 303.

24. *See, e.g.*, Herbert F. Goodrich, *Public Policy in the Law of Conflicts*, 36 W. VA. L.Q. 156, 170 (1930) (public policy was compared to "an elastic kind of grab bag from which one can take out anything which he chooses to put in."); Charles B. Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 MINN. L. REV. 196, 200 (1935) ("We know enough to say with considerable confidence that investigation to determine when the court will apply the doctrine of public policy to deny the recognition of a foreign right would result in the conclusion, 'you never can tell.'").

25. *See* John B. Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647, 693 (1985) ("[P]ublic policy is not likely to fade away.").

26. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981); ARTHUR L. CORBIN, CORBIN ON CONTRACTS §§ 1373-1378 (Supp. 1994).

27. *See* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 90 (1971); ROBERT A. LEFLAR ET AL., AMERICAN CONFLICT LAW 143-45 (4th ed. 1986).

28. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 887-89 (3d ed. 1987).

29. *See* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 72 (2d ed. 1992); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 81 (3d ed. 1986 & Supp. 1991).

30. Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 202 (N.Y. 1918).

31. *See* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161, 169 (E.D. Pa. 1970), *aff'd*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

32. *See* Oppenheimer v. Cattermole, 1976 App. Cas. 249, 278 (H.L.) (dictum)

Whether applied in contracts or in the choice-of-law analysis, a court adheres solely to the public policy of its own jurisdiction. This fundamental aspect of the doctrine gave rise to a number of legal rules invalidating certain foreign acts or judgments for the reason that, in giving effect to such acts, the court would be giving effect to a foreign jurisdiction's public policy or governmental interests. The "revenue rule," according to which one sovereign does not enforce revenue laws or judgments of another sovereign, was founded on this legal notion.[33]

Another aspect of public policy worth emphasizing is the doctrine's inconstant and evolving nature—it changes as society and general notions of justice change. Therefore, there is no public policy for all times and for all countries.[34]

B. Public Policy in the Forum Selection Context

1. In General

The impact of public policy on the interpretation of forum selection clauses is one example of how conceptions of public policy have changed over the years. As already noted, forum agreements were once invalidated for the idea they purported to advance—the desire to oust the noncontractual forum of jurisdiction. At this early time, courts seldom inquired into the reasonableness of litigating the dispute in the contractual forum. The concept of selecting an exclusive forum for litigation was repugnant to public policy.

Today, forum agreements are not considered invalid per se. Courts have accepted the principles embodied in forum clauses. Nonetheless, public policy dictates an exception to the enforcement of forum clauses. Due to factors outside of the parties'

(expressing the view that Nazi decrees depriving absent German Jews of their nationality and confiscating their property as against public policy).

33. *See* Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson, 597 F.2d 1161, 1165 (9th Cir. 1979) ("[T]o recognize the tax judgment from a foreign nation . . . would have the effect of furthering the governmental interests of a foreign country, something which our courts customarily refuse to do."); Moore v. Mitchel, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring) ("To pass upon the provision for the public order of another state is, or at any rate should be, beyond the powers of a court."), *aff'd on other grounds*, 281 U.S. 18 (1930). *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 448 (White, J., dissenting) ("[N]o country has an obligation to further the governmental interests of a foreign sovereign.").

34. *See* Husserl, *supra* note 21, at 41; F.A. Straus & Co., Inc. v. Canadian Pacific Ry. Co., 173 N.E. 564 (N.Y. 1930).

desire and intention in forming such agreements, the clause might be held against public policy. The consequences brought about by a forum selection clause may violate a forum's statutory norms or offend a forum's basic notions of justice and morality. This indirect and consequential method of assessing the applicability of public policy brings the doctrine closer to the mode in which it operates, in the sphere of choice-of-laws. Therefore, not only has there been a shift in the substance of public policy, but the mode of its operation within the context of forum agreements has also shifted from a contract orientation to a choice-of-laws mode.

It is appropriate to take a closer look at the Supreme Court's decision in *The Bremen* to better understand the manner by which a forum selection clause may be rendered invalid as against public policy.

2. *The Public Policy Exception as Defined in* The Bremen: *The Inward and Outward Modes of Operation of the Public Policy Exception*

The operative facts in *The Bremen* were fairly uncomplicated. The plaintiff, Zapata, a Houston-based corporation, entered into an agreement with the owner of The Bremen, Unterweser, a German corporation, to tow its oil rig from Louisiana to Italy.[35] The rig, while being towed in international waters in the Gulf of Mexico, was damaged as a result of a severe storm.[36] Zapata subsequently commenced an admiralty suit in the United States District Court for the Middle District of Florida, located in Tampa, alleging negligent towage and breach of contract.[37] Tampa was the port to which the damaged rig was towed after the storm.[38]

The forum selection clause in the agreement provided that "[a]ny dispute arising [between the parties] must be treated before the London Court of Justice."[39] The agreement also contained an exculpatory clause relieving Unterweser from liability for damages arising to the rig during the towage.[40]

The defendant moved to dismiss the action by invoking the forum selection clause.[41] The district court held the forum

35. *The Bremen*, 407 U.S. at 2.
36. *Id.* at 3.
37. *Id.* at 3-4.
38. *Id.* at 3.
39. *Id.* at 2.
40. *The Bremen*, 407 U.S. at 3 n.2.
41. Zapata v. M/S Bremen, 296 F. Supp. 733, 734 (M.D. Fla. 1969), *aff'd*, 428

clause to be unenforceable.[42] On appeal, the Fifth Circuit affirmed.[43] The Supreme Court ultimately vacated the decision and remanded the case for further consideration. The primary holding in *The Bremen* was that forum selection clauses are "prima facie valid."[44]

One important issue the Court dealt with before validating the forum clause was the precedent established in *Bisso v. Inland Waterways Corp.*[45] In *Bisso*, the Court invalidated a clause exempting a towing company from liability for its own negligence as against public policy.[46] Because the agreement in *The Bremen* contained an exculpatory clause and because the English contractual forum was prepared to enforce exculpatory clauses,[47] Zapata urged the Court to follow *Bisso* and not enforce the forum selection clause on the grounds of public policy.[48]

Zapata's public policy argument was rejected by the Court. The Court distinguished *Bisso* on the basis that, in *Bisso*, the towage took place strictly in American waters,[49] whereas in *The Bremen*, the agreement was international.[50] Because the agreement was international in nature, Unterweser avoided the application of *Bisso* and the public policy against exculpatory clauses.[51] Hence, the intensity of the relationship between the United States and the controversy proved to be a pivotal factor in assessing the application of American public policy on exculpatory clauses.

The presumption in favor of enforcement of forum selection clauses, as announced in *The Bremen*, however, was not abso-

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F.2d 888 (5th Cir. 1970), *aff'd on reh'g*, 446 F.2d 907 (5th Cir.), *cert. granted*, 404 U.S. 937 (1971), *vacated*, 407 U.S. 1 (1972).

42. *Zapata*, 296 F. Supp. at 736. The district court even enjoined Unterweser from proceeding with any further litigation before the contractual forum. *Id.*

43. Zapata v. M/S Bremen, 428 F.2d 888 (5th Cir. 1970), *aff'd*, 446 F.2d 907 (5th Cir.), *cert. granted*, 404 U.S. 937 (1971), *vacated*, 407 U.S. 1 (1972). The court relied primarily on Carbon Black Export, Inc. v. The S.S. Monrosa, 254 F.2d 297 (5th Cir.), *cert. granted*, 358 U.S. 809 (1958), *cert. dismissed*, 359 U.S. 180, *reh'g denied*, 359 U.S. 999 (1959).

44. *The Bremen*, 407 U.S. at 10.

45. 349 U.S. 85 (1955).

46. *Bisso*, 349 U.S. at 90. *See also* Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697, 698 (1963) (per curium).

47. An undisputed affidavit of a British solicitor stated that the exculpatory clause would be held prima facie valid by an English court. *The Bremen*, 407 U.S. at 8 n.8.

48. *The Bremen*, 407 U.S. at 15.

49. *Id.* at 15-16.

50. *Id.* at 16.

51. Justice Douglas dissented from the majority's opinion on this point. *The Bremen*, 407 U.S. at 23-24 (Douglas, J., dissenting).

lute.[52] The Court noted that public policy was one of the exceptions set by the Court to the enforcement of forum clauses.[53]

In articulating the public policy exception, the Court envisioned two scenarios. The first scenario concerned the Court's 1949 decision in *Boyd v. Grand Trunk Western R.R. Co.*,[54] which presented an example of "[a] contractual choice-of-forum clause held unenforceable [because] enforcement would contravene a strong public policy of the forum."[55] In *Boyd*, the Court was faced with the issue of whether a forum agreement entered into between an injured employee and his employer was void under the Federal Employers' Liability Act ("FELA").[56] The Court answered in the affirmative.[57]

The invalidation mode, applied in *Boyd*, can be considered a function of "statutory preemption"[58] because the statute[59] embodied a public policy proscribing the enforceability of the forum agreements.[60] The Supreme Court, in *Boyd*, held that the forum selection clause in the agreement was void under FELA.[61] This outcome was required by the express terms of FELA: "[A]ny contract . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter shall to that extent be void."[62] Many courts, lead by *Boyd*, determined that the venue provision of FELA is an inherent part of an employer's liability.[63] According to this case law, an attempt to limit venue is void as an attempt to exempt the carrier from liability.

A public policy analysis, in the statutory preemption mode, looks inward. Analysis looks at the municipal laws of the forum

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52. *See supra* notes 18-19 and accompanying text.

53. *The Bremen*, 407 U.S. at 15.

54. 338 U.S. 263 (1949).

55. *The Bremen*, 407 U.S. at 15.

56. 45 U.S.C. §§ 51-60 (1988).

57. *Boyd*, 338 U.S. at 265.

58. Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 85 (1992).

59. The venue provision of FELA provides that an action may be brought in any one of three designated fora. The action may be brought in the United States district court or state courts sitting in the district of the residence of the defendant, or in the forum in which the cause of action arose, or in the forum where the defendant shall be doing business at the time of commencing the action. 45 U.S.C. § 56.

60. 45 U.S.C. § 56.

61. *Boyd*, 338 U.S. at 264-65.

62. 45 U.S.C. § 55.

63. *See Boyd*, 338 U.S. at 265; Akerly v. New York Cent. R.R. Co., 168 F.2d 812 (6th Cir. 1948); Krenger v. Pennsylvania R.R. Co., 174 F.2d 556 (2d Cir.), *cert. denied*, 338 U.S. 866 (1949); Peterson v. Ogden Union Ry. & Depot Co., 175 P.2d 744 (Utah 1946).

to determine whether the law militates against relegating the parties to another forum. The law of the designated forum is not relevant to this assessment.

In the Court's second scenario, the law of the contractual forum is relevant to the public policy inquiry. In this regard, the Court envisioned "a remote forum [which will] apply differing foreign law to an essentially American controversy."[64] The Court suggested that a failure to invalidate a forum selection clause may contravene an important public policy of the forum in which the suit is brought.[65]

In the second scenario, the public policy exception looks outward. Analysis scrutinizes the foreign law that may apply to the controversy. To apply the public policy exception, as articulated by the Court, requires a process of comparison between the law applicable in the forum and that applicable in the contracted forum. The second method, in which public policy operates to invalidate a forum selection clause, can be referred to as the "choice-of-law mode."

The outward focus mode of operation of the public policy exception is best exemplified by *Quick Erectors, Inc. v. Seattle Bronze Corp.*[66] In *Quick Erectors*, the plaintiff, in spite of a forum selection clause designating the Supreme Court of New York as the exclusive forum in which actions against the defendant were to be brought, filed suit in a Missouri state court.[67] Subsequently, the action was removed to federal district court in Missouri on diversity grounds.[68] In the agreement, the parties also provided for a contractual period of limitation of one year. Under New York law, parties may agree on a period of limitation shorter than the regular statutory period.[69] Under Missouri law, however, parties to a contract may not limit the statute of limitations.[70] It was clear that if the forum selection clause was enforced, thus obliging the plaintiff to sue in New York, his action would have been time-barred because more than one year had passed from the time his cause of action accrued.[71] This prospective outcome prompted the court to invalidate the forum

64. *The Bremen*, 407 U.S. at 17.
65. *Id.*
66. 524 F. Supp. 351 (E.D. Mo. 1981).
67. *Quick Erectors*, 524 F. Supp. at 352-55.
68. *Id.* at 353.
69. *Id.* at 356-57.
70. *Id.* at 357.
71. *Id.*

selection clause.[72] The court reasoned:

> Because the forum state has decided as a matter of public policy that it would be unreasonable or unjust for one of its citizens to be prevented from having his day in court by virtue of a contractually shortened period of limitation, this Court, in this instance, finds that it should not enforce the forum selection clause. Plaintiff has prevailed in its argument that this case falls within the public policy exception to the general rule of enforceability of forum selection clauses which the Supreme Court carved out in M/S Bremen.[73]

It is evident from the court's decision that had New York law not permitted a contractually shortened period of limitation, the court would have relegated the parties to litigate in New York. Therefore, the applicable law in the designated forum proved to be a decisive factor.

In sum, it is apparent that the public policy exception to the enforcement of forum selection clauses operates in two different modes. The first mode of statutory preemption focuses inward to the municipal law of the forum. The second, the choice-of-law mode, looks outward to the law of the designated forum.

The categorization of the exception into two modes of operation suggests that when viewed through its narrow operation in a well-defined context, such as forum selection clauses, the public policy doctrine seems less elusive. Therefore, if analysis can identify case patterns and factors influencing the application of public policy within the context of forum agreements, the doctrine will be more easily understood and workable.

III. THE EXCLUSIVENESS OF THE FORUM SELECTION CLAUSE

To find a pattern in the workings of the public policy exception to confine the doctrine, inquiry must first determine the kinds of forum selection-clauses to which the exception applies.

Courts have long recognized two kinds of forum selection clauses: exclusive and nonexclusive.[74] In an exclusive forum selection clause, the parties desire to limit litigation among themselves to a specific forum.[75] In a nonexclusive forum selection clause, the

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72. *Quick Erectors*, 524 F. Supp. at 357.

73. *Id.*

74. GARY BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS, COMMENTARY AND MATERIALS 224 (2d ed. 1992).

75. A typical exclusive choice-of-forum clause reads:

> It is agreed by and between the parties that all disputes and matters whatsoever arising under, in connection with or incident to this contract shall be litigated, if at all, in and before a court located in [name of country, state or city], to the exclusion of the courts of any other state or country.

parties intended to secure a designated forum to adjudicate future controversies without excluding other forums.[76]

A nonexclusive forum selection clause, referred to as a "prorogation" clause,[77] did not arouse much controversy until recently.[78] Courts regarded the parties' submission to its jurisdiction as sufficient to confer personal jurisdiction despite the fact that, absent the prorogation clause, the court would lack such jurisdiction.[79] When courts considered exclusive forum selection clauses, referred to as "derogation" clauses,[80] they had difficulty enforcing the clauses because in the usual setting, the court was asked not to exercise its jurisdiction in favor of the designated court.[81]

It is not always an easy task determining whether a forum selection clause is exclusive or nonexclusive. If the language of the clause leaves no doubt as to its exclusiveness,[82] a court will ordinarily categorize the clause in accordance with its wording[83] and in accordance with the parties' intent as evinced by surrounding circumstances.[84] When less obvious language is used, however, courts seem reluctant to find a clause exclusive.[85] For

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Cf. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 588-89 (1991).

76. A nonexclusive forum selection clause could read: "[T]he parties submit to the jurisdiction of the court/s of [name of country, state or city]." *Cf.* Keaty v. Freeport Indonesia, Inc., 503 F.2d 955, 956 (5th Cir. 1974) (per curiam).

77. *See, e.g.*, SCOLES & HAY, *supra* note 29, at 361; BORN & WESTIN, *supra* note 74, at 224.

78. *See* Taylor, *supra* note 5 (prorogation clauses contradict personal jurisdiction theory); Solimine, *supra* note 58, at 64-69 (the doctrine permitting waiving jurisdictional rights through a forum selection clause too quickly abandoned the personal jurisdiction theory).

79. *See* D. H. Overmyer Co., Inc. v. Frick Co., 405 U.S. 174 (1972); Swarb v. Lennox, 405 U.S. 191, *reh'g denied*, 405 U.S. 1049 (1972); National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964). *See also* Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 192-98 (1982); Juenger, *supra* note 13, at 51.

80. SCOLES & HAY, *supra* note 29, at 361.

81. Gruson, *supra* note 79, at 136-37. It should be added that a derogation clause has a prorogation effect as well vis-a-vis the contractual forum. If the action is brought in the designated forum in accordance with the exclusive forum selection clause, the clause can confer personal jurisdiction if such a jurisdiction is lacking. In this respect, Gruson has noted: "[A]n exclusive forum selection clause is a Janus-headed clause: on the one side it is a submission to the jurisdiction of the contractual forum . . . and on the other side it is an exclusion or ouster of all other jurisdictions." *Id.* at 136 (footnote omitted).

82. *See supra* note 75 and accompanying text.

83. BORN & WESTIN, *supra* note 74, at 225. *See also* Gruson, *supra* note 79, at 134 (the exclusiveness of the clause is a matter of contract interpretation).

84. Gilbert, *supra* note 2, at 7.

85. BORN & WESTIN, *supra* note 74, at 222. *But see* Borchers, *supra* note 16, at 82 (when the exclusiveness of a forum clause is unclear, courts have a mild preference for interpreting the clause to be of an exclusive nature).

example, the Second Circuit has recently determined that the following clause was nonexclusive: "Any dispute arising between the parties thereunder shall come within the jurisdiction of the competent Greek Courts, specifically of the Thessaloniki Courts."[86] In both operation modes of the exception—the statutory preemption mode and the choice-of-law mode—the underlying setting is that of an exclusive forum selection clause which is being considered by a noncontractual forum. It is only in this situation that the public policy exception in its dual operation mode becomes relevant, at least as far as *The Bremen* is concerned. This assertion becomes more evident after considering and dismissing the following three potential settings in which a court considers the enforcement of a forum selection clause. The three settings are:

(a) a noncontractual forum considering the enforcement of a nonexclusive forum selection clause;

(b) a contractual forum considering enforcement of a nonexclusive forum selection clause;

(c) a contractual forum considering enforcement of an exclusive forum selection clause.

In setting (a), the forum selection clause merely confers jurisdiction on another court without jeopardizing litigation in the noncontractual forum.[87] Because such a forum is not precluded from adjudicating the parties' dispute, it has, in most cases, only to establish personal and subject matter jurisdiction in order to proceed to judgment. In this situation, the jurisdiction of the noncontractual forum is not jeopardized by the forum clause and there is no need to call upon public policy to invalidate it. The

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86. John Boutari & Son, Wines & Spirits v. Attiki Imports, 22 F.3d 51, 52-53 (2d Cir. 1994). Likewise, other courts have also held a clause with similar wording to be nonexclusive. *See* McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341 (8th Cir.) ("Any difference . . . should be settled through Iranian courts."), *cert. denied*, 474 U.S. 948 (1985); International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Koski Constr. Co., 474 F. Supp. 370, 371 (W.D. Pa. 1979) ("The parties to this contract hereby agree that the proper venue for the institution of any action, legal or equitable, for violations of any provision of this Agreement shall be in Erie County, Pennsylvania."); First Nat'l City Bank v. Nanz, Inc., 437 F. Supp. 184, 186 (S.D.N.Y. 1975) ("The Supreme Court of the State of New York within any county of the City of New York shall have jurisdiction of any dispute.").

87. Gruson describes the options presented by a nonexclusive forum selection clause as follows:

> In [this] case . . . plaintiff could bring an action in any forum that has personal jurisdiction over the defendant and subject matter jurisdiction over the claims in dispute, but if the plaintiff wishes to commence the action in the contractual forum he is assured by virtue of the defendant's consent to jurisdiction of *in personam* jurisdiction over the defendant.

Gruson, *supra* note 79, at 193 (footnote omitted).

court can adjudicate the dispute notwithstanding the forum clause.

In settings (b) and (c), where the action is brought in the contractual forum, public policy as an exception is precluded from playing an effective role. In both modes of operation, the public policy exception is intended to keep litigation in the forum, notwithstanding the forum selection clause.[88] In the settings of (b) and (c), however, the action is brought in the contractual forum in conformity with the clause. Therefore, the public policy exception, as envisioned by *The Bremen*, serves no real purpose in the settings of (b) or (c).

Theoretically, an argument could be made that even when the action is brought in the contractual forum (settings (b) and (c)), public policy in its dual operation mode could still play a role. For example, after bringing the action in the contractual forum, the defendant could move for dismissal on the ground of forum non conveniens.[89] Or, if the action was brought in a federal district court and the transferee court is a federal district court sitting in another district, the defendant may move for transfer based on 28 U.S.C. § 1404(a).[90] In response to these tactics, the plaintiff can argue that the forum's public policy demands that the action not be dismissed or transferred because the public policy of the forum requires that the forum proceed to judgment. This argument can be based on the reasoning that the relevant law of the other forum is repugnant to the forum's public policy (the choice-of-law mode) or because the forum's law requires, without regard to the foreign applicable law, that the action be tried in the forum (the statutory preemption mode).

Even though one could imagine such an argument between litigants, the situation is more theoretical than realistic. It should be noted that when the contractual court is asked to reject a § 1404(a) transfer, or a forum non conveniens dismissal request, because public policy requires the forum to handle the action, in essence, the court is not asked to invalidate the forum clause on public policy grounds. To the contrary, the court is asked to validate the clause on public policy grounds. In this situation, *The Bremen*'s public policy exception analysis is not involved.

Such a formalistic answer does not take public policy out of the

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88. *See supra* Section II.B.2.

89. Gruson, *supra* note 79, at 137.

90. *Id.* Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1988).

forum selection clause context, much less make the invocation of public policy theoretical. However, public policy plays no role when an action is brought in the contractual forum because the plaintiff need not reach the stage of invoking public policy. When a plaintiff attempts to keep the litigation in the contractual forum, the plaintiff has a much stronger argument than one based on public policy; why should the court allow a defendant who has agreed to the forum's jurisdiction not be held to its agreement? Is the inconvenience of the defendant worthy of consideration when the defendant agreed to litigate in the contractual forum? The Supreme Court in *The Bremen* answered this question stating:

> [W]here it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable.[91]

This view seems to have been generally accepted by courts,[92] thus making the assertion of public policy to keep a suit in the contractual forum a matter of theory only.

It is thus apparent that when public policy is asserted against enforcement of a forum selection clause two conditions must be met: the clause is exclusive and the forum in which action is commenced is not the designated forum. Only in this setting will public policy play a role in exempting the forum selection clause from enforcement.

IV. THE INTERNATIONAL SETTING OF THE AGREEMENT

The international or domestic orientation of the agreement further confines the public policy exception to the enforcement of forum selection clauses.

Courts have frequently emphasized the international setting of the relationship between the parties when declining to employ the public policy exception to the enforcement of a forum selection clause.[93] A similar emphasis is made when a court is asked

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91. *The Bremen*, 407 U.S. at 16.

92. Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 378 (7th Cir. 1990) ("[O]ne who has agreed to be sued in the forum selected by the plaintiff has thereby agreed not to seek to retract his agreement by asking for a change of venue on the basis of costs or inconvenience to himself."); United Mortgage Corp. v. Plaza Mortgage Corp., 853 F. Supp. 311, 315 (D. Minn. 1994) ("Because [the defendant] expressly consented to the choice of Minnesota as a forum the court has little sympathy for [the defendant's] claims of inconvenience in defending suit in Minnesota.").

93. *See* Bonny v. Society of Lloyd's, 3 F.3d 156, 162 (7th Cir. 1993); Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1363 (2d Cir.), *cert. denied*, 114 S. Ct. 385

to enforce an arbitration clause in favor of a foreign arbitrator.[94] In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[95] the Supreme Court, in justifying its enforcement of an arbitration clause requiring the parties, among them an American, to arbitrate an antitrust action before a Japanese panel, observed:

> [C]oncerns of international comity, respect for the capacities of foreign and international tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[96]

The distinction drawn by the Court in *Mitsubishi* between a domestic and an international setting derived from the Court's decision in *The Bremen*. As indicated earlier, in *The Bremen* the Court employed a test measuring the intensity of the relationship between the parties and the controversy to the forum in order to determine whether to apply the *Bisso* principle. Therefore, in *The Bremen*, after the Court observed that the agreement containing the forum selection clause was international in nature, it drew back American public policy on exculpatory clauses and, thereby, limited the *Bisso* holding invalidating exculpatory clauses to domestic cases.[97]

It is no coincidence that the Court chose this approach. It is often stated that a strong connection between the forum and the controversy is needed in order to justify the application of the forum's public policy.[98] As the relationship between the forum and the controversy grows weaker, the forum typically will be less compelled to apply its public policy. Professor Nussbaum refers to this phenomena as embodying the "relativity principle" in the application of the public policy doctrine.[99] One can also

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(1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956-58 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992); Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 915 (3d Cir. 1988), *cert. dismissed*, 490 U.S. 1001 (1989); Carbide BMW, Inc. v. Bayerische Motorn Werke Aktiengesellschaft, 821 F. Supp. 802, 819 (D.P.R. 1993), *vacated*, 19 F.3d 745 (1st Cir. 1994); Medoil Corp. v. Citicorp, 729 F. Supp. 1456, 1460 (S.D.N.Y. 1990).

94. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, *reh'g denied*, 483 U.S. 1056 (1987); Scherk v. Alberto-Culver Co., 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974).

95. 473 U.S. 614 (1985).

96. *Mitsubishi*, 473 U.S. at 629.

97. *The Bremen*, 407 U.S. at 15-16.

98. *See* Murphy, *supra* note 21, at 610; Paulsen & Sovern, *supra* note 21, at 981.

99. Nussbaum, *supra* note 21, at 1031.

refer to this principle as the "intensity of relationship" test.[100] Therefore, when the Court in *The Bremen* spoke about a remote forum applying foreign law to an "essentially American controversy," it was in essence referring to the relativity principle.

In practice, when courts are asked to employ their public policy for the purposes of invalidating the forum selection clause, the orientation of the relationship between the litigants, whether domestic or international, plays a central role in accepting or rejecting the invocation of public policy.

The Third Circuit's decision in *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*[101] exemplifies how an internationally dominated relationship manages to block public policy from invalidating a forum selection clause. In *Hodes*, an American couple, Mr. and Mrs. Hodes, initiated an action in the United States after sailing on the Achille Lauro, an Italian-flag vessel, on a cruise in the Mediterranean Sea which began in Genoa, Italy, and was supposed to end there eleven days later.[102] During the cruise the Achille Lauro was hijacked by terrorists and an American citizen was killed by the hijackers.[103] Although the Hodeses asserted a number of claims against the defendants,[104] in essence they asserted that they were not provided with adequate security during the cruise.[105] The Hodeses ultimately sought damages in the amount of $26,500,000 in total.[106]

The court found that the tickets for the cruise were sold worldwide and that approximately ten percent of the advertising budget of the joint venture operating the Achille Lauro was allocated to the United States and Canada.[107] The court also observed that, at the time the cruise departed, only 72 of 728 passengers were American citizens.[108] The cruise tickets purchased by the Hodes contained a forum clause designating Naples, Italy, with exclusive jurisdiction and provided a choice-of-law clause apply-

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100. Both terms are, hereinafter, used interchangeably.

101. 858 F.2d 905, 915 (3d Cir. 1988), *cert. dismissed*, 490 U.S. 1001 (1989).

102. *Hodes*, 858 F.2d at 906.

103. *Id.*

104. The Hodeses claimed negligence, intentional infliction of emotional distress, breach of the maritime law obligation to provide safe passage and breach of contract and implied warranties. *Hodes*, 858 F.2d at 907.

105. *Hodes*, 858 F.2d at 907.

106. The total amount of the Hodeses' action was composed of the following sums: $5,000,000 to compensate Mrs. Hodes; $1,500,000 to compensate Mr. Hodes (the difference probably attributed to the fact the Mr. Hodes was not on the ship at the time of the hijacking but had disembarked to tour Egypt) and $10,000,000 for each as punitive damages. *Hodes*, 858 U.S. at 907.

107. *Hodes*, 858 F.2d at 907.

108. *Id.*

ing Italian law to all contractual disputes.[109] The Hodeses argued vigorously against enforcement of the forum selection clause on the grounds of public policy, due to the harsh consequences that would result if they were forced to litigate the claim in Italy.[110] Under Italian law, the carrier might be exempted from liability, and, if not, would only be liable for a ceiling sum of $10,000.[111]

The Third Circuit rejected the Hodeses' public policy arguments and "adamantly refuse[d] to wield the trump of American public policy."[112] The court went on to rule that "American passengers simply do not carry American public policy on their backs wheresoever they may venture."[113] Because most of the defendants, the ship, the applicable law and the course of the cruise were all closely connected to Italy, the court naturally decided to "leave it for Italian courts to allocate the liabilities of this Italian dispute."[114]

The Third Circuit's holding in *Hodes* supports the assertion that the international setting of the agreement is an important factor in assessing whether to apply American public policy. In *Hodes*, the court even disregarded the parties' abstention from putting forward an expert opinion on Italian law and did not question whether such law would enforce the ceiling amount or absolve the carrier from liability completely.[115] Irrespective of whether Italian law precluded compensation or limited it to a ceiling, the Hodeses' $26.5 million suit still had to be adjudicated in Italy according to the forum selection clause.

The Bremen supports the position of the Third Circuit. According to *The Bremen* Court, when articulating the choice-of-law mode of the public policy exception, the mode relevant in *Hodes*,[116] it spoke of a "foreign forum" applying "differing for-

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109. *Id.*
110. *Id.* at 912-16.
111. *Id.* at 915.
112. *Hodes*, 858 F.2d at 915.
113. *Id.*
114. *Id.*
115. *Id.* at 913.
116. The Third Circuit in *Hodes* resorted to the statutory preemptive mode but to no avail. The Hodeses' first public policy argument relied on the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315 (1988). *Hodes*, 858 F.2d at 914. They asserted that COGSA invalidates the forum clause because the clause necessarily lessens the carrier's liability, and is therefore against the express language of COGSA. *Id.* However, the court found COGSA inapplicable to the Hodeses' claims because the enactment was limited to voyages that touch the United States and the Hodeses' voyage did not. *Id.* As to the ramifications of COGSA on forum clauses, see discussion *supra* Section V.A.1-2.

eign law to an essentially American controversy."[117] If the controversy is essentially not American, but foreign, then analysis disregards American public policy.[118] Therefore, when the controversy in *Hodes* was characterized as being an "Italian dispute"[119] and not being "essentially American," the court felt no compulsion to invoke American public policy.[120]

The intensity of relationship test is so fundamental to the determination to apply public policy to a forum clause dispute that even in the "bad old days" when the clause was deemed to be inherently against public policy, a court faced with a truly international agreement enforced a forum selection clause contained in the agreement. Such was the case in *Mittenthal v. Mascagni*.[121] The defendant, Mascagni, who was an Italian composer, signed a contract with the plaintiffs, who were citizens of New York, in which he undertook to direct certain concerts and operas during a fifteen-week tour through the United States and Canada.[122] The contract was written in Italian and signed in Florence, Italy.[123] It is important to note that the plaintiffs had contractually elected Italy to be their domicile.[124] Furthermore, the contract contained a choice-of-law clause applying Italian law and providing that the civil authorities of Florence, Italy, shall adjudicate disputes between the parties.[125]

It is not clear from the court's decision why the action was brought against Mascagni. Moreover, the court did not state why Mascagni was sued in a Massachusetts state court. Apparently, Mascagni defaulted and was hailed into court in Massachusetts, where he happened to be present after default.

Relying on the forum selection clause, Mascagni moved to dismiss the action for lack of jurisdiction and the Supreme Judicial Court of Massachusetts ultimately enforced the clause.[126]

After stressing the substantial contacts the case had with Italy

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117. *The Bremen*, 407 U.S. at 17.

118. In *The Bremen*, the agreement had an exculpatory clause which, if present in a domestic voyage, would have been held invalid according to the *Bisso* decision. However, because the agreement was characterized as international and despite the fact that the exculpatory clause would be enforceable under English law, thereby relieving the carrier of liability, the Court enforced the forum clause. *The Bremen*, 407 U.S. at 17-20.

119. *Hodes*, 858 F.2d at 915.

120. *Id.*

121. 66 N.E. 425 (Mass. 1903).

122. *Mittenthal*, 66 N.E. at 425.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 425-27.

and noting that the contract was also to be partly performed there,[127] the court found that there was nothing so objectionable in the present forum selection clause on the grounds of public policy.[128] The court also explained that "[t]he contract was between citizens of foreign states who, so far as our tribunals are concerned . . . might take any reasonable arrangement for the settlement of their disputes."[129] The forum clause was reasonable because it purported to eliminate the possibility of litigation arising in the numerous jurisdictions to which the contract was connected.[130]

Over a decade later, the Supreme Judicial Court of Massachusetts in *Nashua River Paper Co. v. Hammermill Paper Co.*,[131] made it clear that it still adhered to the "ouster" theory and abstained from overruling *Mittenthal*.[132] Nonetheless, the court in *Nashua* distinguished the cases asserting that, in *Mittenthal*, the parties were aliens, and the relationship was that "of hurried travel through many jurisdictions."[133]

It should also be noted that the court in *Mittenthal* arrived at its conclusion without inquiring into the prospective outcome of the controversy under Italian law. The court seemed concerned only with whether the forum clause was enforceable under Italian law.[134] On the other hand, when a controversy had significant contacts with the United States, thus scoring high on the intensity of relationship test, but yet was not "essentially American," courts did inquire into the nature of the law applicable in the designated forum. Such was the case in *Roby v. Corporation of Lloyd's*.[135] In *Roby*, over one hundred American citizens and residents who invested in Lloyd's syndicates filed suit alleging that they had suffered financial losses as a result of the defendants' violations of the Securities Acts of 1933[136] and 1934[137] and the Racketeer Influenced and Corrupt Organizations Act ("RICO").[138]

Lloyd's operation was thoroughly reviewed by the court.[139]

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127. *Mittenthal*, 66 N.E. at 426.
128. *Id.*
129. *Id.*
130. *Id.* at 426-27.
131. 111 N.E. 678 (Mass. 1916).
132. *Nashua*, 111 N.E. at 681.
133. *Id.*
134. *Id.*
135. 996 F.2d 1353 (2d Cir.), *cert. denied*, 114 S. Ct. 385 (1993).
136. 15 U.S.C. §§ 77a-77bbbb (1988).
137. *Id.* §§ 78a-78*ll*.
138. 18 U.S.C. §§ 1961-1968 (1988).
139. *Roby*, 996 F.2d at 1357-58.

Most of the plaintiffs in *Roby* were actively solicited in the United States by Lloyd's representatives[140] but each was contractually obligated to litigate a dispute in England.[141]

The Second Circuit ultimately affirmed the district court's order dismissing the actions for improper venue based on the obligation to litigate in England.[142] However, in doing so the court was seriously concerned with the anticipated outcome of litigation in England.

First, the court took notice of the fact that the securities laws were aimed at protecting American investors by requiring a high standard of disclosure.[143] Furthermore, by including anti-waiver provisions in the securities laws, Congress intended to prevent the thwarting of American public policy as incorporated in the securities laws.[144] The court concluded that the public policy of the securities laws would be contravened if the application of foreign law inadequately deterred issuers from exploiting American investors.[145]

However, English law, as ascertained by the court, was found to embody several adequate remedies available to vindicate the substantive rights of the American investors and was found to provide sufficient deterrence against exploitation.[146] Therefore, public policy did not invalidate the forum selection clause.[147]

Furthermore, in its *Roby* decision, the Second Circuit stated that it disagreed with the Tenth Circuit decision in *Riley v. Kingsley Underwriting Agencies, Ltd.*,[148] on the ground that the Tenth Circuit ignored the substantive law applicable in the designated forum.[149] In discussing a forum selection clause and a choice-of-law clause, with respect to claims similar to those discussed in *Roby*, the Tenth Circuit noted: "When an agreement is truly international, as here, and reflects numerous contacts with the foreign forum, the Supreme Court has quite clearly held that the parties' choice of law and forum selection provisions will be given effect."[150]

Such wording by the Tenth Circuit could lead to the conclu-

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140. *Id.* at 1365.
141. *Id.* at 1357-58.
142. *Id.* at 1366.
143. *Id.* at 1364.
144. *Roby*, 996 F.2d at 1364.
145. *Id.* at 1364-65.
146. *Id.* at 1365-66.
147. *Id.* at 1366.
148. 969 F.2d 953 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992).
149. *Roby*, 996 F.2d at 1362-63.
150. *Riley*, 969 F.2d at 957.

sion, as arrived at by the Second Circuit in *Roby*, that the substance of the foreign law will not be relevant to the enforcement of a forum selection clause in an action brought by an American investor based on the securities laws. Nonetheless, the *Riley* and *Roby* decisions, in essence, did not take opposing positions. The intensity of the relationship between the United States and the respective transactions was not the same in both cases.

In *Riley*, the Tenth Circuit spoke about a "truly international" agreement, whereas the agreement in *Roby* did not qualify as such. In *Roby*, the Second Circuit went out of its way to emphasize the fact that it was dealing with the claims of hundreds of American investors who were "actively solicited in the United States by Lloyd's representatives."[151] On the other hand, in *Riley*, the action was brought by a lone American investor who "traveled to England on several occasions to pursue his quest" in investing with Lloyd's.[152] It is, therefore, clear that the international setting in the cases is not the same.

It would certainly seem odd if the Second Circuit had invalidated the forum selection clause for the sole reason that an investor happened to be an American while all of the other parties and other aspects of the relationship were closely connected to a foreign jurisdiction which also happened to be the place where the parties contractually agreed to litigate. If, in such a case, the Second Circuit had held that American public policy was sufficiently infringed, because the foreign forum did not afford an adequate remedy, the "provincial attitude" of which *The Bremen* warned would appear.[153] It may be added that, in *The Bremen*, it was quite apparent to the Court that, if relegated to the foreign contractual forum, the American party would have had a very slim chance of recovering damages due the exculpatory clause in the agreement.[154]

Therefore, when the contacts with the noncontractual American forum are so attenuated, as was the case in *Riley*, it is not surprising that the court ignored the applicable law in the contractual forum. However, when such contacts were much stronger in *Roby*, the court was concerned about the outcome of the case if litigated in England. Having scored differently on the intensity of relationship test, both cases cannot therefore be equated. The contrast between *Riley* and *Roby* demonstrates how the intensity of relationship test is a vital tool in assessing the application of

151. *Roby*, 996 F.2d at 1365.
152. *Riley*, 969 F.2d at 955.
153. *The Bremen*, 407 U.S. at 12.
154. *See supra* note 51 and accompanying text.

domestic public policy.

Moreover, the Second Circuit in *Roby* also failed to appreciate the fact that, in *Riley*, the Tenth Circuit did take cognizance of English law, which was the law made applicable by the agreement. While the court did not give much weight to the outcome of the case under English law, the Tenth Circuit reasoned: "English law does not preclude Riley from pursuing an action for fraud."[155]

The intensity of relationship test, which inquires into the strength of the relationship between the controversy and the forum, is of fundamental importance in assessing whether to apply domestic public policy and invalidate the forum selection clause. The more contacts the case has with the United States, or with a particular state, the more inclined a court will be to apply its public policy to invalidate a forum selection clause.

V. THE DUAL OPERATIONAL MODES OF THE EXCEPTION IN DETAIL

Our endeavor to confine the public policy exception to the enforcement of forum selection clauses, to improve certainty and predictability in its employment, can be carried out further if its statutory preemption and choice-of-law modes of operation are analyzed in more detail.

A. Statutory Preemption

The statutory preemption analysis of a forum selection clause is essentially an inquiry into how explicit a statutory scheme must be in order to invalidate the clause.

Basically, Congress has the constitutional authority to enact statutes limiting the validity of forum agreements.[156] However, an express provision invalidating forum agreements has not yet been enacted. Thus, a norm against the enforcement of forum clauses is deduced from other statutory schemes.

The Supreme Court, in dealing with a similar inquiry, but concerning the validity of arbitration clauses, observed: "Having made the bargain to arbitrate the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[157] Analo-

155. *Riley*, 969 F.2d at 958.

156. Solimine, *supra* note 58, at 85.

157. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

gously, in the forum selection context, a question arises: How and where can we find the "evinced" congressional intent? Should we focus on the text of the relevant statutory provision[158] or is a broader latitude of inquiry permissible? The Court seems, at least in the arbitration context, to prefer the latter approach. In *Shearson/American Express, Inc. v. McMahon*,[159] the Court considered the "text, history, or purpose of the statute" to be relevant to discern the intent of Congress.[160]

Until recently, in the forum agreement context, the liberal approach of interpretation dominated.[161] However, after the Supreme Court's decision in *Carnival Cruise Lines, Inc. v. Shute*[162] an intent much more explicit than that provided by the objectives of the legislative scheme is required in order to hold a forum selection clause invalid through the statutory preemption mode. To fully understand this important shift, an outline of the liberal interpretive attitude that prevailed before *Carnival Cruise* is provided.

1. Background: The Indussa *Progeny*

Case law dealing with the validity of forum agreements under the Carriage of Goods by Sea Act ("COGSA")[163] adequately demonstrates how the underlying policies of a statute, rather than the literal meaning of a text, call for the invalidation of forum clauses.

The leading case dealing with the validity of forum clauses under COGSA is *Indussa Corp. v. S.S. Ranborg*.[164] The plaintiff, Indussa, a New York corporation, was the consignee of goods shipped from Belgium to San Francisco.[165] On delivery, the cargo was found to be damaged, primarily due to rust.[166] The damage was estimated in the amount of $2,600.[167] The S.S. Ranborg, the carrier of the goods, having been found in American waters, was named defendant in an in rem action brought by Indussa.[168] The action was brought in the District Court for the

158. *Cf.* West Virginia Univ. Hosp., Inc. v. Casey, 499 U.S. 83 (1991).
159. 482 U.S. 220 (1987).
160. *Shearson/American*, 462 U.S. at 227. *See also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).
161. *See* discussion *infra* Section V.A.1.
162. 499 U.S. 585 (1991).
163. 46 U.S.C. app. §§ 1300-1315 (1988).
164. 377 F.2d 200 (2d Cir. 1967).
165. *Indussa*, 377 F.2d at 200.
166. *Id.* at 201.
167. *Id.*
168. *Id.*

Southern District of New York.[169] The bills of lading drawn on the damaged goods included a clause entitled "Jurisdiction" prescribing that "[a]ny dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business."[170] Because the principal place of business of Ranborg's owner was alleged to be in Norway, a motion was entered for an order declining jurisdiction based on the forum agreement.[171] The district court, following the Second Circuit's decision in *Wm. H. Muller & Co. v. Swedish American Line, Ltd.*,[172] declined jurisdiction in favor of the courts of Norway.[173] In *Muller*, the Second Circuit validated a forum clause in a bill of lading drawn on goods shipped to Philadelphia, even though the clause designated the courts of Sweden.[174] The *Muller* court was influenced by the fact that foreign statutory law corresponding to COGSA, primarily of Canada and Australia, contained provisions that expressly held forum selection clauses invalid, whereas COGSA did not.[175]

On appeal, however, the district court's decision in *Indussa* was reversed.[176] Consequently, the *Muller* holding was also overruled.[177]

In *Indussa*, the Second Circuit concluded that forum selection clauses selecting a foreign court are inherently invalid under COGSA.[178] First, the court pointed out that COGSA applies to all bills of lading regarding goods carried by sea to and from the United States.[179] Therefore, an American court is obliged to apply COGSA when a bill of lading falls within its scope.[180] Because a foreign court is under no obligation to apply COGSA, relegating the parties to that foreign court would circumvent COGSA.[181] The court stated:

> Although these provisions of COGSA . . . do not speak directly to a clause which simply vests a foreign court with exclusive jurisdiction, giving effect to such a clause is almost as objectionable as enforcing a clause

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169. *Id.* at 200.
170. *Indussa*, 377 F.2d at 201.
171. *Id.*
172. 224 F.2d 806 (2d Cir.), *cert. denied*, 350 U.S. 903 (1955), *overruled by* Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967).
173. *Indussa*, 377 F.2d at 200.
174. *Muller*, 224 F.2d at 808.
175. *Id.* at 807.
176. *Indussa*, 377 F.2d at 204.
177. *Id.*
178. *Id.*
179. *Id.* at 203.
180. *Id.*
181. *Indussa*, 224 F.2d at 203.

> subjecting the bill of lading to foreign law since, despite hortatory efforts, there would seem to be no way, save perhaps stipulation by the parties, that would bind the foreign court in its choice of applicable law.[182]

The Second Circuit went on to consider the COGSA provisions dealing with anti-waiver clauses.[183] Under COGSA, "any clause, covenant, or agreement . . . relieving the carrier . . . for loss or damage to or in connection with the goods . . . or lessening such liability . . . shall be null and void and of no effect."[184] Accordingly, the Second Circuit concluded that even if the foreign designated court would apply COGSA or a similar enactment,[185] a trial in this forum "might lessen [the] carrier's liability."[186] The potential for lessening liability is almost always present, the Second Circuit explained, when a plaintiff is burdened by having to litigate abroad.[187] In light of the forum clause relegating the parties to litigate abroad, the plaintiff might not pursue litigation at all, thereby relieving the defendant of liability.[188] The Second Circuit, therefore, held, a priori, the forum agreement invalid under COGSA.[189]

The *Indussa* decision was severely criticized.[190] Nonetheless, despite *The Bremen*'s preaching about the values of international commerce, commentators,[191] and the majority of jurisdictions[192] abided by the *Indussa* ruling. Therefore, a forum selec-

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182. *Id.* (citations omitted).

183. *Id.* at 203-04.

184. 46 U.S.C. app. § 1303(8).

185. Early in its decision, the Second Circuit noted that Norwegian law, the law applicable according to the bill of lading, was almost identical to COGSA. *Indussa*, 377 F.2d at 201.

186. *Indussa*, 377 F.2d at 203.

187. *Id.*

188. The Second Circuit observed: "[T]o require an American plaintiff to assert his claim only in a distant court lessens the liability of the carrier quite substantially, particularly when the claim is small. Such a clause puts 'a high hurdle' in the way of enforcing liability." *Indussa*, 377 F.2d at 203 (citation omitted).

189. *Indussa*, 377 F.2d at 204.

190. *See* Stephen M. Denning, *Choice of Forum Clauses in Bills of Lading*, 2 J. MAR. L. & COM. 17 (1970) (characterizing *Indussa* as moving in the opposite direction). *See also* Justin L. Williams, *Forum-Selection Clauses: Where They Are—Where They are Going*, 6 HOUS. J. INT'L L. 1, 13-14 (1983).

191. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 552 (2d ed. 1994) (characterizing the *Indussa* rule a practical approach). *See also* Charles L. Black, Jr., The Bremen, *COGSA and the Problem of Conflicting Interpretation*, 6 VAND. J. TRANSNAT'L L. 365 (1973); Allan I. Mendelson, *Liberalism, Choice of Forum Clauses and the Hague Rules*, 2 J. MAR. L. & COM. 661 (1971).

192. *See* Hughes Drilling Fluids v. M/V Luo Fu Shan, 852 F.2d 840 (5th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989); Conklin & Garret, Ltd. v. M/V Finnrose, 826 F.2d 1441 (5th Cir. 1987); Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon, 642 F.2d 721 (4th Cir. 1981); C.A. Seguros Orinoco v. Na Viera Transpapel, C.A., 677 F. Supp. 675 (D.P.R. 1988). *Cf.* Fireman's Fund Am. Ins. Cos. v. Puerto Rican Forward-

tion clause in a bill of lading that designates a foreign forum is likely to be invalidated because it inherently contradicts Congress' policy as contained in COGSA.[193] This is particularly true when the bill of lading is for the carriage of goods by sea to or from the United States.[194] When there is no such connection with the United States, then COGSA is not applicable and it will not restrict the enforcement of forum selection clauses.[195]

2. *Limitations on the* Indussa *Principle*

Two developments appear to limit the applicability of the *Indussa* principle. The first is minor and the second could substantively curtail the principle.

The minor limitation results from a distinction drawn regarding the source for the application of COGSA. If COGSA is found to be applicable by its own terms, *ex proprio vigore*,[196] the *Indussa* principal is not affected.[197] If, on the other hand, COGSA is found to be applicable on the sole basis of being incorporated by a choice-of-law clause in the agreement, then the *Indussa* principal may not be applicable.[198] This approach relies on common sense. It is difficult to imagine that the parties, after agreeing to a forum selection clause, would choose a law that would invalidate their forum agreement. The choice of COGSA must have been based on the assumption that it would not invalidate the forum clause.

This approach is consistent with that taken in response to agreements that select a law hostile to forum selection clauses despite the inclusion of a forum clause in the agreement. Such was the setting in *Bense v. Interstate Battery Systems of America*.[199] In *Bense*, the plaintiff objected to transferring the action from New York to Texas in compliance with a forum selection clause, arguing that the clause was void because Texas law, the law selected by the agreement, held forum agreements to be

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ing Co., 492 F.2d 1294 (1st Cir. 1974).

For an additional survey, see C. Andrews Waters, *The Enforceability of Forum Selection Clauses in Maritime Bills of Lading: An Update*, 15 TUL. MAR. L.J. 29, 40-45 (1990).

193. *S.S. Elikon*, 642 F.2d at 724-25.

194. 46 U.S.C. app. § 1300.

195. *See* Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 914 (3d Cir. 1988), *cert. dismissed*, 490 U.S. 1001 (1989). *Cf.* North River Ins. Co. v. Fed/Sea Pac. Line, 647 F.2d 985 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982).

196. *See* 46 U.S.C. app. § 1300.

197. *See* Waters, *supra* note 192, at 38-39.

198. *Id.* at 39 (citations omitted).

199. 683 F.2d 718 (2d Cir. 1982).

invalid.[200] The Second Circuit had little tolerance for the argument. The court, in rejecting the argument, stated: "[The plaintiff's] interpretation would render the forum selection clause meaningless, and would thus frustrate the purpose of the parties as it is clearly set forth in the agreement."[201]

Therefore, it is important to scrutinize the basis for the applicability of a statute prior to reaching a conclusion that it invalidates forum agreements. If it applies by the power of its incorporation, and not *ex proprio vigore*, common sense militates against the invalidation of a forum selection clause on public policy grounds. The fact that under regular circumstances the statute will not tolerate forum clauses should not dictate a similar intolerance when the enactment is applicable by reason of the parties' wish. It was that same wish that prescribed the inclusion of the forum selection clause.

The major limitation on the *Indussa* principle is embodied in the Supreme Court's recent decision in *Carnival Cruise Lines, Inc. v. Shute*.[202] A Washington state couple, Mr. and Mrs. Shute, purchased tickets for a seven-day cruise aboard the Tropicale, a ship owned by Carnival Cruise Lines ("Carnival"), a corporation headquartered in Miami, Florida.[203] The tickets purchased by the Shutes contained a forum selection clause designating the courts of Florida with exclusive jurisdiction.[204] During the cruise, and while the ship was in international waters, Mrs. Shute slipped on a deck mat and suffered personal injuries.[205] Upon their return home, the Shutes filed suit against Carnival in a federal district court in Washington claiming that Mrs. Shute's fall was a result of the negligence of Carnival.[206]

Carnival moved for summary judgment, contending that the forum agreement required bringing the action in Florida, and alternatively, argued that the district court lacked personal jurisdiction.[207] The district court accepted Carnival's argument concerning the lack of personal jurisdiction and, thereby, granted its motion.[208]

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200. *Bense*, 683 F.2d at 719-20.

201. *Id.* at 722. *See also* Lexington Inv. Co. v. Southwest Stainless, Inc., 697 F. Supp. 139 (S.D.N.Y. 1988).

202. 499 U.S. 585 (1991).

203. *Carnival Cruise*, 499 U.S. at 587.

204. *Id.*

205. *Id.* at 588

206. *Id.*

207. *Id.*

208. *Carnival Cruise*, 499 U.S. at 588.

On appeal the Ninth Circuit reversed.[209] The Ninth Circuit found that the district court had personal jurisdiction. Moreover, the court refused to enforce the forum clause because it was contained in an agreement which was not the result of free bargaining, but was a contract of adhesion.[210]

The Supreme Court reversed the Ninth Circuit in a decision which strongly favored the enforcement of forum selection clauses. Justice Blackmun, speaking for a 7-2 majority, stated that the fact that the clause was in a standard form contract, and was not freely bargained for, was in itself not sufficient to hold the clause unenforceable.[211]

Importantly, the Shuteses based their argument to invalidate the forum clause on the Limitation of Vessel Owner's Liability Act ("LVOLA").[212] LVOLA provides that:

> It shall be unlawful for the manager, agent, master or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from negligence or fault of such owner . . . to relieve such owner . . . from liability . . . or (2) purporting in such event to lessen, weaken, or void the right of any claimant to trial by court of competent jurisdiction . . . . All such provisions . . . are declared to be against public policy and shall be null and void and of no effect.[213]

This provision is strikingly similar to the anti-waiver clause found in COGSA.[214] Additionally, both enactments have similar scopes of applicability.[215] Nonetheless, the Court took a course of statutory interpretation much more conservative than that taken by the Second Circuit in *Indussa*.

The majority in *Carnival Cruise* took cognizance of the legislative history of LVOLA only to find that there was no express prohibition against forum selection clauses.[216] In the absence of an express intent, Justice Blackmun concluded: "Because the

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209. Shute v. Carnival Cruise Lines, 863 F.2d 1437, 1438 (9th Cir. 1988), *modified*, 897 F.2d 377 (9th Cir. 1990), *rev'd*, 499 U.S. 585 (1991).

210. *Shute*, 863 F.2d at 1448.

211. *Carnival Cruise*, 499 U.S. at 593.

212. 46 U.S.C. app. §§ 181-196 (1988).

213. *Id.* app. § 183c.

214. *See supra* note 182 and accompanying text.

215. *Compare* 46 U.S.C. app. § 183b(a) ("It shall be unlawful for the manager . . . of any sea-going vessel . . . transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide.") *with* 46 U.S.C. app. § 1300 ("Every bill of lading . . . for the carriage of goods by sea to or from ports of the United States.").

216. *Carnival Cruise*, 499 U.S. at 596.

clause before us allows for judicial resolution of claims against petitioner and does not purport to limit petitioner's liability for negligence, it does not violate § 183c."[217]

Justice Stevens, joined by Justice Marshall, disagreed strongly with the majority on this issue.[218] Justice Stevens noted that in 1936, when LVOLA was enacted, courts still adhered to the traditional rule which denied enforcement of forum selection clauses.[219] Therefore, there was no need to include an express prohibition against forum agreements in LVOLA.[220] Secondly, quoting from congressional debates, Justice Stevens concluded that LVOLA intended to put a stop to all "practices and practices of like character," the purpose of which was to lessen a carrier's liability.[221] Justice Stevens asserted that "[a] liberal reading"[222] of LVOLA prohibits the inclusion of forum selection clauses in passenger tickets just as COGSA prohibits the inclusion of such clauses in bills of lading.[223] It is not surprising, therefore, that Justice Stevens drew support from the *Indussa* progeny.[224]

Nonetheless, the majority stood firmly behind its holding. The majority's reasoning suggests an approach of wide application. Because the Court dwelled heavily on the express rather than the implicit intent of Congress, anything short of a straightforward prohibition cannot be considered as a prohibition against forum selection clauses. The dissent's rationale for the absence of an express prohibition was not sufficient for the majority. In consequence, *Carnival Cruise* appears to oppose the *Indussa* principal. Commentators have recognized this inference and have concluded that *Indussa* and its progeny are questionable in light of *Carnival Cruise*.[225]

It can be argued that *Indussa* is to be spared the edge of *Carnival Cruise* on the premise that the former dealt with an inter-

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217. *Id.* at 596-97.

218. Justice Stevens also disagreed with the majority on the issue of form contracts. *Carnival Cruise*, 499 U.S. at 597-601 (Stevens, J., dissenting). Justice Stevens opined that a forum selection clause in a standardized passenger ticket is unenforceable. *Id.* at 601.

219. *Carnival Cruise*, 499 U.S. at 602.

220. *Id.* at 603-04.

221. *Id.* at 602-03.

222. *Id.* at 603.

223. *Id.* at 603-04.

224. *Carnival Cruise*, 499 U.S. at 604.

225. *See* Borchers, *supra* note 16, at 77 (*Carnival Cruise* has implicitly overruled *Indussa* and its progeny); Michael F. Sturley, Case Note, *Strengthening the Presumption of Validity for Choice of Forum Clauses*, 23 J. MAR. L. & COM. 131, 142-43 (1992) (after *Carnival Cruise*, it is difficult to justify the *Indussa* rationale).

national agreement. If the *Indussa* court were faced with a forum agreement designating Florida courts, instead of the courts of Norway, the *Indussa* court may have enforced the clause.[226] The Second Circuit in *Indussa* stressed the fact that an American tribunal would be subject "to the uniform control of the Supreme Court."[227] This, the court explained, differentiated American from Norwegian courts.[228] Even if the latter courts were to apply an enactment similar or even identical to COGSA, there is no guarantee that they would implement the enactment according to American precedent.

Although this distinction might have been valid at the time, at the present time, the prevalent view is that, in light of *The Bremen*, the international setting of the agreement tips the scale heavily in favor of enforcing the forum selection clause.[229] Additionally, because *Carnival Cruise* had a domestic setting, the rationale advanced by the majority, which only strengthened the presumption of the validity of forum clauses, should apply with much more force in an international setting similar to that in *Indussa*. In turn, this further erodes the effectiveness of the *Indussa* principle.

Another side effect resulting from *Carnival Cruise* derives from the fact that the case dealt with a personal injury action. As a matter of principle, it is recognized that the interests of protecting and preserving human life weigh heavily when compared with that of protecting the economic integrity of various entities.[230] Thus, in a situation where one must decide whether to implement a certain norm aimed at protecting the physical integrity of humans or one aimed at protecting economic welfare, preference should be given to the former.[231] A commentator has suggested a similar approach when attempting to provide guide-

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226. *See* Fireman's Fund Am. Ins. Co. v. Puerto Rican Forwarding Co., 492 F.2d 1294, 1296 (1st Cir. 1974) (holding the *Indussa* principle inapplicable because the designated forum was an American court rather than a foreign court).

227. *Indussa*, 377 F.2d at 204.

228. *Id.*

229. *See supra* Section IV.

230. *Cf.* David E. Seidelson, *Resolving Choice-of-Law Problems Through Interest Analysis in Personal Injury Actions: A Suggested Order of Priority Among Competing State Interests and Among Available Techniques for Weighing Those Interests*, 30 DUQ. L. REV. 869 (1992). In a choice-of-law inquiry that presents a true conflict, the law "[p]rotecting and preserving human life must be assigned greater significance than that aimed at protecting economic integrity." *Id.* at 875.

231. Seidelson, *supra* note 230, at 875. *See also* David E. Seidelson, *Choice-of-Law Problems in Medical Malpractice Actions: Legislative Prescriptions and Judicial Side Effects*, 28 DUQ. L. REV. 41, 86 (1989) ("[A] conduct regulating interest aimed at protecting and preserving human life, almost by definition, appears to be of a greater moment than a competing interest in protecting economic integrity.").

lines for the usage of public policy.[232] In this light, the sweeping effect of *Carnival Cruise* is magnified. The *Indussa* principle originated in an action brought for damages to goods amounting to $2,600.[233] The Second Circuit, however, found an implicit congressional intent compelling it to overrule its prior decision in *Muller* and hold forum agreements void under COGSA.[234] On the other hand, *Carnival Cruise* dealt with a personal injury action. Considering the traditional preference given to the protection of human life, it is expected that the Court would adopt a less tolerant approach toward forum agreements than that of *Indussa*. The Shuteses were in essence asked to travel across the country to pursue a personal injury action. The majority in *Carnival Cruise*, however, stood behind its decision. The effect of this course on the pursuance of future personal injury actions, and the potential that forum clauses will serve as de facto exculpatory clauses to the benefit of large corporations[235] did not figure into the majority's analysis.

This pumps new life into the Second Circuit's earlier decision in *Muller*. In *Muller*, the Second Circuit noted at the outset of its decision that COGSA does not "expressly invalidate the jurisdictional agreement in the bill of lading here involved."[236] The Second Circuit also recognized that corresponding enactments to COGSA, in both Australia and Canada, expressly invalidated forum agreements, while COGSA did not.[237] Therefore, the court concluded that "if Congress had intended to invalidate such agreements, it would have done so in a forthright manner."[238]

In light of the Supreme Court's decision in *Carnival Cruise*, it is reasonable to conclude that implicit language based on the history and purpose of a statute is not sufficient to trigger the public policy exception in its statutory preemption mode. A statutory scheme much more explicit in its defiance to forum selection clauses may be required.

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232. Simson, *supra* note 21, at 408.

233. *Indussa*, 377 F.2d at 201.

234. *Id.* at 203.

235. *See* Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 425 (1992) (in *Carnival Cruise*, the Court failed to discuss the fact that forum clauses constitute a powerful litigation weapon for large corporate defendants).

236. *Muller*, 224 F.2d at 807.

237. *Id.*

238. *Id.*

3. *Statutorily Preemptive Special Venue Schemes*

Public policy can invalidate forum selection clauses by way of statutorily preemptive venue provisions.[239]

In consideration of the special legal relationship existent between parties to a contract with a forum selection clause, a number of statutes regulating such relationships involve venue provisions different from general venue rules. In providing special venue provisions in a certain enactment, it can be presumed that the legislature intended to provide an exclusive forum which cannot be defeated by a private agreement.

Until recently, the Miller Act[240] was indicative in this regard.[241] In principle, the Miller Act grants a right of action to a subcontractor furnishing labor or materials to the United States whereby the subcontractor can sue in the name of the United States on a surety bond of the general contractor.[242] Such an action, the Miller Act provides, "shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere."[243]

Initially, a majority of courts interpreted the venue provision of the Miller Act to suggest a strong public policy against enforcement of forum agreements.[244] However, it appears that the modern trend favors a more conservative course of interpretation, which in turn comports with the general liberal approach toward enforcement of forum clauses. The Fifth Circuit, in *In re Fireman's Fund*,[245] which was strongly influenced by *The Bremen*, concluded that because venue provisions exist for the convenience of the parties and can be waived, "[s]uch a provision is subject to variation by . . . agreement."[246]

Therefore, in providing special venue provisions, a statute does not necessarily preempt a forum selection clause which points to another forum for litigation.[247] This approach appears to be the majority view today.[248]

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239. *See* Solimine, *supra* note 58, at 88.
240. 40 U.S.C. §§ 270a-270d (1988).
241. *See* Gruson, *supra* note 79, at 174-75.
242. 40 U.S.C. § 270b(a).
243. *Id.* § 270b(b).
244. *See* Gruson, *supra* note 79, at 174-75 (citations omitted).
245. 588 F.2d 93 (5th Cir. 1979).
246. *Fireman's Fund*, 588 F.2d at 95.
247. *See* Solimine, *supra* note 58, at 88.
248. *See* Arrow Plumbing & Heating Co. v. American Mechanical Servs. Corp., 810 F. Supp. 369, 371 (D.R.I. 1993). *Cf.* United States *ex rel.* Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc., 364 F.2d 705, 708 (2d Cir.), *cert. dismissed*, 385 U.S. 924 (1966) (upholding the enforceability of arbitration clauses in subcontract

Does this suggest a "crack" in *Boyd* and its progeny? FELA, the act under consideration in *Boyd*, includes an anti-waiver prescription. The Miller Act does not and its provisions have been held to be subject to waiver.[249] Therefore, the Court in *Boyd*, in considering FELA, had much stronger ground from which to invalidate forum clauses than it had with the Miller Act.

Recent developments, however, suggest that even when anti-waiver provisions are present, forum agreements may still be spared invalidation. As indicated previously, *Carnival Cruise* strongly backs this proposition.[250] However, in this regard, *Carnival Cruise* does not stand alone. In analyzing the anti-waiver provisions included in the securities acts,[251] the Supreme Court, in the context of arbitration, has repeatedly held that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum."[252] Courts have followed suit and analogously applied the above rationale to include, *mutatis mutandis*, forum agreements, whether the designated court is American[253] or foreign.[254] Finding arbitration and forum clauses, in this regard, similar,[255] *Boyd*'s premise seems jeopardized. If arbitration before a panel does not, in itself, infringe on the substantive right of liti-

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agreements principally governed by the Miller Act).

249. *See, e.g.*, United States *ex rel.* Youngstown Welding v. Travelers Indem. Co., 802 F.2d 1164, 1166 (9th Cir. 1986); Warrior Constructors, Inc. v. Harders, Inc., 387 F.2d 727, 729 (5th Cir. 1967).

250. *See supra* notes 210-38 and accompanying text.

251. 15 U.S.C. §§ 77n, 78cc(a) (1988).

252. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). *See also* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989), *overruling* Wilko v. Swan, 346 U.S. 427 (1953).

253. Friedman v. World Transp., Inc., 636 F. Supp. 685, 692 (N.D. Ill. 1986).

254. Bonny v. Society of Lloyd's, 3 F.3d 156, 161 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1057 (1994); Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1363 (2d Cir. 1993).

255. However, the Supreme Court in *Mitsubishi* leaned toward the proposition that the treatment of forum agreements might be less tolerable than that of arbitration clauses. In dicta, the Court indicated that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi*, 473 U.S. at 637 n.19. Earlier in its opinion, the Court also stressed the fact that international arbitration owes no prior "allegiance to the legal norms of particular states." *Id.* at 636. This implies that the treatment of a forum clause designating a foreign court might be different from arbitration.

However, as indicated earlier, this dicta was not followed and what proved to be of determinant importance regarding forum agreements is the inquiry whether the law applicable in the designated forum offers sufficient remedies vindicating the substantive rights of the plaintiff. *See infra* Section V.B.

gation, why would litigation before a foreign official tribunal? Surely, comity and respect for international commercial activity do not support such a result.

The trend is clearly in favor of the conservative interpretation given in *Carnival Cruise*, thereby reinforcing the validity of forum selection clauses. Courts, in light of the general policy favoring enforcement of forum agreements, tend to concentrate on the explicit language of the enactment.[256] The possibility of defying the underlying purposes of a statutory scheme is countered by the general policy favoring enforcement of clauses providing means of dispute resolution between the parties.[257]

This analysis not only comports with the recent decisions rendered by the Supreme Court, but also with a logical notion regarding public policy in general. If, in fact, a forum agreement is against public policy the legislature could provide a straightforward statement concerning the ineffectiveness of such clauses. This is particularly true in light of the anti-waiver provisions present in different statutes. These provisions attest to the fact that when the legislature has a special need to invalidate certain kinds of common contractual stipulations hindering the policies of a legislative scheme, it expressly does so.

Even if the particular statute was enacted when the dominating view was against forum clauses,[258] over two decades have passed since *The Bremen* was decided. Meanwhile, Congress and other state legislatures have not expressly declared policy on the subject. The absence of such a declaration only strengthens the basic proposition that more explicit language is needed in order to find forum agreements invalid under a certain act.

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256. *See* Weiss v. Columbia Pictures Television, Inc., 801 F. Supp. 1276, 1281-82 (S.D.N.Y. 1992) ("Examining the plain language of the . . . [Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1988)], it is clear that Congress did not intend to limit the applicability of forum agreement in ADEA cases.").

257. Regarding arbitration see, e.g., Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (enforcing an arbitration clause in an age discrimination claim invoking ADEA); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (giving effect to arbitration claims invoking the securities acts), *overruling* Wilko v. Swan, 346 U.S. 427 (1953); Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 227, 242 (validating arbitration agreements under RICO and the Securities Exchange Act); *Mitsubishi*, 473 U.S. at 632 (enforcing an arbitration clause invoking antitrust laws).

In the forum selection clause context, see, e.g., *Bonny*, 3 F.3d at 162 (validating a forum clause under the Securities Acts and RICO); *Roby*, 996 F.2d at 1363; Bense v. Interstate Battery Sys. of Am., 683 F.2d 718, 722 (2d Cir. 1982) (enforcing a forum agreement regarding an antitrust action); *Weiss*, 801 F. Supp. at 1281-82 (enforcing a forum clause regarding a claim under ADEA).

258. *Cf. Carnival Cruise*, 499 U.S. at 601 (Stevens, J., dissenting).

4. The Private Attorney General Scheme as Statutorily Preemptive

Does the inclusion of private attorney general provisions in a certain statute militate against the enforcement of forum selection clauses on public policy grounds?

Private attorney general provisions are intended to strengthen the enforcement of statutes incorporating such provisions. By giving private individuals a prosecutorial role for certain statutory infringements, the legislature intends to encourage law enforcement and provide for a wide vindication of a statute.[259] If, however, a private citizen, in light of a forum agreement, is discouraged from pursuing the role of private attorney general, the clear and centered policy of law enforcement is at risk. Therefore, the concepts of private attorneys general and forum clauses can clash.

Another factor that sharpens the conflict is the fact that private attorney general schemes contemplate not only the interests of the individual commencing the action but that of third parties and that of the public at large. Thus, if the noncontractual court will enforce the forum clause, notwithstanding its finding that the plaintiff will not be able to pursue litigation in the designated forum, the court may sacrifice the interests of third parties and the public at large.

If public policy is called on to invalidate a forum selection clause when the role of the private attorney general is hindered, public policy will operate in the statutory preemption mode, not in the choice-of-law mode, because the law applicable in the designated forum could be identical to the law applicable in the forum in which suit is brought. Notwithstanding a match of applicable law, the forum clause relegating the parties to the designated forum still may be held unenforceable. The potential reluctance of plaintiffs in pursuing their private attorneys general roles if litigation is appropriated to the designated forum is at issue.

Public policy, the private attorney general scheme and a forum selection clause were all at issue in *Red Bull Associates v. Best Western International, Inc.*[260] Red Bull, a limited partnership which owned and operated a motel in Poughkeepsie, New York,

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259. *See* Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 401 (1967) (per curiam) ("When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.").

260. 686 F. Supp. 447 (S.D.N.Y.), *aff'd*, 862 F.2d 963 (2d Cir. 1988).

filed suit against Best Western alleging that its licensing agreement was terminated by Best Western for racially discriminatory reasons.[261] Red Bull's action was based on the civil rights acts.[262] The action was filed in a federal district court in New York, despite the existence of a forum agreement between the parties designating the federal or state courts of Arizona with exclusive jurisdiction.[263] Relying on the forum clause, Best Western moved to dismiss the suit pursuant to Federal Rule of Civil Procedure 12(b)(3), or, alternatively, to transfer the action to a federal district court in Arizona pursuant to 28 U.S.C. § 1404(a).[264] Ultimately, the court denied both motions after holding the forum clause invalid as against public policy.[265]

The court noted that Congress, by incorporating the private attorney general concept into the civil rights laws, intended to encourage litigation of civil rights claims.[266] The court responded to Best Western's contention that the plaintiffs were free to bring the same action in a federal court in Arizona with an argument based on the concept of the jury system.[267] The court explained that the right of trial by jury makes it of special importance for the case to be tried by a jury which is local to the transactions and infringements at issue in the suit because a local jury will be more concerned with the matter of the suit than a distant jury in a foreign jurisdiction.[268] The court also found the private attorney general role to be the main factor militating against the enforcement of the forum clause. The court observed:

> Plaintiffs were given the status of private attorneys general precisely because Congress felt that governmental units could not be relied upon to take the initiative. . . . In giving private parties a role in the enforcement of these laws, Congress did not rely upon altruism. It sought to harness economic self interest. We accordingly find that transferring this litigation to Arizona would contravene a strong public policy of the forum in which suit is brought.[269]

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261. *Red Bull*, 686 F. Supp. at 448. The licensing agreement was allegedly terminated because Red Bull provided lodging to Hispanic and African-American homeless persons. *Id.* The support of the local welfare department made such lodging possible. *Id.*

262. *Id.*

263. *Id.* The forum agreement stated: "Unless waived by Best Western in whole or in part, the Courts located in the State of Arizona, state or Federal, shall have exclusive jurisdiction to hear and determine all claims, disputes and actions arising from or relating to this application and agreement." *Id.*

264. *Id.*

265. *Id.* at 452.

266. *Red Bull*, 686 F. Supp. at 451.

267. *Id.* at 452.

268. *Id.*

269. *Id.*

Although this argument seemed sufficient to invalidate the forum clause, the court did not stop there. The court took special notice of the plaintiffs' declaration that if relegated to litigate in Arizona they would not pursue their action.[270] Therefore, the public policy behind the private attorney general scheme would be hindered by the enforcement of a forum agreement which would prevent or seriously discourage the pursuit of litigation.[271] The plaintiffs' declaration appeared sufficient for the court to invalidate the forum clause despite its earlier finding that the plaintiffs failed to demonstrate that it would be impossible for them to litigate in Arizona.[272] This lenient standard, the court explained, was needed because what is at stake is not only the private right to litigate held by an individual but the rights embodied in the private attorney general scheme which cannot be easily waived through a forum selection clause.[273]

The *Red Bull* decision, therefore, conceives of the private attorney general scheme as an adequate determinant in invalidating a forum agreement on public policy grounds. According to the reasoning of *Red Bull*, if the plaintiff is unwilling to pursue litigation in the designated forum notwithstanding its ability to do so, the court will still be inclined to invoke public policy to invalidate the forum clause. However, public policy, as utilized in *Red Bull*, seems to depend on the existence of another factor which underlined the court's decision. Litigation must be commenced in the forum in which the cause of action arose. Otherwise, the right to a jury trial and the plaintiff's willingness to pursue litigation would have been completely irrelevant to the court's argument.

The *Red Bull* principle has been severely curtailed by a recent trend favoring party autonomy in dispute resolution. In a relatively recent decision, the same district court held that the private attorney general provision of a statute does not necessarily preclude enforcement of forum selection clauses. In *Weiss v. Columbia Pictures Television, Inc.*,[274] the plaintiff, in spite of a forum agreement designating Los Angeles, California, with exclusive jurisdiction for litigating any dispute concerning his employment contract, brought an age discrimination suit against his employer in a federal district court in New York City.[275] Relying on *Red Bull*, the plaintiff argued that by bringing his action un-

270. *Id.* at 453.
271. *Red Bull*, 686 F. Supp. at 453.
272. *Id.* at 451.
273. *Id.* at 453.
274. 801 F. Supp. 1276 (S.D.N.Y. 1992).
275. *Weiss*, 801 F. Supp. at 1277.

der the Federal Age Discrimination in Employment Act ("ADEA")[276] he was also assuming the role of a private attorney general and, therefore, the forum clause should be invalidated on public policy grounds.[277] The court rejected the public policy argument.[278]

The court first noted that, unlike the situation in *Red Bull*, the age discrimination action at issue in *Weiss* did not implicate, either expressly or implicitly, the rights of a third party.[279] In *Red Bull*, such an implication was made because the civil rights claim asserted the rights of the current and prospective tenants. The plaintiff in *Weiss* asserted a right to personal damages only.[280] The court also recognized that, unlike the plaintiff in *Red Bull*, the plaintiff in *Weiss* was financially capable of pursuing his action in a California forum.[281] The court in *Weiss* relied on the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[282] which held that age discrimination claims under ADEA are subject to compulsory arbitration pursuant to arbitration clauses.[283] The court reasoned that as claims brought under ADEA are arbitrable, other district courts should be able to adjudicate such claims.[284] Furthermore, the Supreme Court in *Gilmer* held that the involvement of an administrative agency in the enforcement of ADEA does not preclude arbitration under ADEA.[285]

Interestingly, neither the *Weiss* court nor the *Gilmer* Court were concerned that a person bringing an action under the ADEA is entitled to a jury trial.[286]

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276. 29 U.S.C. §§ 621-634 (1988).

277. *Weiss*, 801 F. Supp. at 1280. Under ADEA, the age discrimination claim could also be pursued by the Equal Employment Opportunity Commission. 29 U.S.C. § 626.

278. *Weiss*, 801 F. Supp. at 1281.

279. *Id.* at 1280.

280. *Id.*

281. *Id.* at 1280-81.

282. 500 U.S. 20 (1991).

283. *Gilmer*, 500 U.S. at 35.

284. The court expressed this analogous conclusion in the following words:

> Although forum selection clauses are not the subject of a federal statute compelling their enforcement, the policies underlying the Federal Arbitration Act are similar to those revealed in the line of Supreme Court cases supporting the enforcement of forum selection clauses. The purpose of both changes in the law was to counteract judicial hostility to the enforcement of such contractual provisions and manifest a liberal policy favoring these types of clauses.

Weiss, 801 F. Supp. at 1281 (citations omitted).

285. *Gilmer*, 500 U.S. at 28-29 ("[T]he mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration."); *Weiss*, 801 F. Supp. at 1281 (applying the same standard with respect to forum selection clauses).

286. *See* 29 U.S.C. § 626(c)(2).

In sum, the *Weiss* decision reflects the current trend regarding the ramifications of the private attorney general role on the enforcement of forum agreements. This assessment is supported by the fact that the inclusion of private attorney general provisions in other statutes has not produced a public policy against the enforcement of forum clauses. The antitrust statutes, for example, authorize private individuals and governmental units to prosecute different antitrust activities.[287] The prosecutorial role given private plaintiffs under the antitrust laws earned such plaintiffs the title of "private attorneys general."[288] Courts, however, did not call upon public policy to invalidate forum selection clauses regarding actions invoking American antitrust legislation.[289]

Moreover, the risk of diminishing third party rights if litigation is not pursued by a private attorney general also appears insufficient as public policy to invalidate forum agreements. Antitrust and securities laws are intended to protect third party interests and those of the public at large.[290] Claims under these enactments, however, are not considered immune from forum clauses. Public policy is not called on to invalidate a forum clause on the basis that the cause of action was created to protect third party interests. If third party interests are of special importance and are at risk of being severely negated, in light of the forum clause, the governmental unit should, and probably would, initiate prosecution and not depend on the private attorney general.

In sum, *Red Bull* presently does not have much authority.[291] The trend is clearly in favor of enforcing forum clauses, notwithstanding the private attorney general role.

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287. Generally, antitrust statues are enforced by federal enforcement agencies—the Antitrust Division of the Department of Justice and the Federal Trade Commission—the attorneys general of the individual states and private plaintiffs. *See* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 130 (1993). Every entity is empowered to prosecute for certain antitrust claims, though at times concurrent prosecuting authority is present. *Id.* at 130-36. Regarding private individuals, the Clayton Act grants any person who has been injured in business or property by reason of anything forbidden in the antitrust laws the right to sue and recover treble damages and costs of the suit including reasonable attorney's fee. 15 U.S.C. § 15a (1988). The Clayton Act also grants a private plaintiff the right to seek injunctive relief. *Id.* § 15c.

288. BLAIR & HARRISON, *supra* note 287, at 133.

289. Bense v. Interstate Battery Sys. of Am., 683 F.2d 718, 720-22 (2d Cir. 1982). *Cf.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (enforcing an arbitration clause invoking antitrust laws).

290. *See* Omron Healthcare, Inc. v. Maclaren Exports Ltd., 28 F.3d 600, 603 (7th Cir. 1994) (antitrust and securities laws are designed for the benefit of consumers).

291. *See* Solimine, *supra* note 58, at 95 ("*Red Bull* seems to be anomalous.").

B. Choice-of-Law Mode—The Outward Focus of Public Policy

When there is no statutory preemption of a forum selection clause, it is necessary to inquire whether the forum clause will be invalidated in light of the substantive law applicable in the designated forum. This has been identified as the outward focus of public policy. Such a mode of operation resembles the traditional usage of the public policy doctrine in the choice-of-laws context. In the choice-of-laws context, public policy is a shield-like legal device which protects a forum from the enforcement of foreign law when such enforcement is called for by the regular choice-of-law rules.

In light of the resemblance between the function of public policy in the context of choice-of-laws and that in which the doctrine operates in the sphere of forum agreements, the fundamental rules already designed for public policy in the choice-of-laws context may help in assessing the application of the public policy exception to the enforcement of forum selection clauses. For instance, the rule that the forum should apply its own public policy and not that of another jurisdiction[292] could be utilized in the forum clause context. Thus, if the forum in which action is brought is the contractual forum, and the forum is asked not to enforce the forum selection clause because the public policy of another jurisdiction requires that litigation be held there, such an argument is to be dismissed. As already stated, by accepting such an argument the forum will be implementing the public policy of another jurisdiction—a course rejected thus far by choice-of-laws principles.[293]

Another ground rule, which also has its origins in the choice-of-law context of public policy is that a mere difference between the forum's law, also known as the *lex fori*, and that of the designated forum is not sufficient to warrant the nonenforcement of the forum agreement. The Second Circuit demonstrated this proposition in *Roby*, when it observed:

> It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not

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292. *See supra* Section II.B.2.

293. This explains why, in considering the type of a forum clause—exclusive or nonexclusive—vis-a-vis the forum considering the enforcement of the clause, this hypothetical was not considered.

The defendant in such a setting could argue against enforcement based on forum non conveniens—a § 1404(a) transfer. However, as indicated earlier, such a possibility is more theoretical than realistic. *See supra* Section II.

> recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of his country's tort law or his country's statutory law or his country's property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction.[294]

Moreover, if the plaintiff's claim invokes laws fundamentally American, such as antitrust and securities laws, a clause relegating an American plaintiff to a foreign tribunal in which foreign laws are to be applied is not inherently invalid.[295] The determinative inquiry asks whether the law applicable in the designated forum affords the plaintiff a sufficient remedy. The Seventh Circuit's recent decision in *Bonny v. Society of Lloyd's*[296] illustrates how the adequacy of remedies awarded in the designated forum prove to be fundamental. In *Bonny*, as in *Roby*, the action was brought by Americans who invested in the insurance market run by Lloyd's.[297] The *Bonny* plaintiffs argued that they were fraudulently induced to invest in Lloyd's.[298] It was alleged that Lloyd's, through its agents, who were also named as defendants, failed to disclose material facts and risk factors concerning the investment.[299] The *Bonny* claims were brought under the Securities Acts of 1933 and 1934, RICO, common law fraud, negligence and breach of duty.[300]

Lloyd's and its agents motioned to dismiss the suit based on a forum selection clause and an arbitration provision designating England as the forum for litigation.[301] The agreements also provided a choice-of-law clause in favor of English law concerning all matters connected with plaintiff's investment with Lloyd's.[302]

The plaintiffs argued against dismissal, claiming that the fo-

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294. Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1360 (2d Cir. 1993). *See also* Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 958 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992); Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858 F.2d 905, 915 (3d Cir. 1988), *cert. dismissed*, 490 U.S. 1001 (1989); Medoil Corp. v. Citicorp, 729 F. Supp. 1456, 1460 (S.D.N.Y. 1990).

295. *See* Bonny v. Society of Lloyd's, 3 F.3d 156, 162 (7th Cir. 1993) (claim invoking securities acts and RICO); *Roby*, 996 F.2d at 1363 (claims invoking the securities acts and RICO); *Riley*, 969 F.2d at 958 (claim invoking the securities acts); AVC Nederland B.V. v. Atrium Inv. Partnership, 740 F.2d 148, 155-160 (2d Cir. 1984) (claims invoking the securities acts); *cf.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (enforcing an arbitration clause invoking antitrust laws).

296. 3 F.3d 156 (7th Cir. 1993).

297. *Bonny*, 3 F.3d at 158.

298. *Id.* at 159.

299. *Id.*

300. *Id.*

301. *Id.* at 157.

302. *Bonny*, 3 F.3d at 158 n.4.

rum selection and the choice-of-law clauses violated the anti-waiver provisions of the securities acts and, therefore, were void as against public policy.[303] The district court and the Seventh Circuit, in a de novo review, rejected the plaintiff's public policy argument and consequently enforced the forum clause.[304]

The Seventh Circuit, after stressing *The Bremen*'s favorable attitude toward the enforcement of forum selection clauses,[305] emphasized that by including anti-waiver provisions in the securities laws, Congress intended that the public policy embodied in such enactments should not be thwarted.[306] The determinative issue concerning the applicability of public policy was the nature and substance of the law in the contractual forum. If the remedies available in the selected forum did not subvert the public policy of the securities laws, the forum agreements would be enforced.[307] Recourse to English law was of fundamental importance in *Bonny* because, as in *Roby*, which was distinguishable from *Riley*, the American investors were solicited in the United States.[308]

Accordingly, the Seventh Circuit inquired into English law and found that it provided the plaintiffs with a cause of action for fraud and a claim for recision if made in reliance on misrepresentation.[309] Furthermore, English law was found to embody criminal sanctions for misleading statements or omissions made knowingly or recklessly.[310] Relying on these aspects of English law,[311] English law was found to provide adequate remedies and deter issuers from deceiving American investors.[312] English law did not offend American public policy despite the fact that American law provided the plaintiffs with a greater chance of success and promoted American public policy.[313] Neither was sufficient to hold the forum clause as against public policy when English law was found to offer adequate relief.

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303. *Id.* at 159.
304. *Id.* at 161.
305. *Id.* at 159-160.
306. *Id.* at 160-61.
307. *Bonny*, 3 F.3d at 161.
308. *Id.* at 158. The *Bonny* plaintiffs traveled to England only to sign the agreement. *Id.*
309. *Id.* at 161.
310. *Id.*
311. The court also discussed the applicability of another English enactment, the Lloyd's Act of 1982, and whether this act barred the plaintiffs' action if pursued in English courts. *Bonny*, 3 F.3d at 161-62. The court seemed to be relieved that Lloyd's stipulated that it would not raise such a defense, especially after finding that an English court would not raise the bar sua sponte. *Id.*
312. *Bonny*, 3 F.3d at 162.
313. *Id.*

The *Bonny* decision raises an important issue essential to the assessment of the applicability of the choice-of-law mode of the public policy exception. The issue concerns the nature of the law applicable in the designated forum. As the *Bonny* decision demonstrates, the applicable law in the selected forum is of fundamental importance in determining whether to invoke the public policy exception to invalidate the forum agreement.[314] If, for instance, English law did not provide a remedy for the American plaintiffs, thereby leaving Lloyd's and its agents legally immune from liability, the Seventh Circuit would have invalidated the forum clause as against public policy. The fact that such a legal reality might prove to be an economic disincentive for prospective investors in Lloyd's did not constitute an ample substitute to an actual normative deterrence. In turn, the choice-of-law mode required the court to engage in a choice-of-law assessment, as if it were filling the shoes of the designated court and using the choice-of-law rules of the designated forum—a mode which resembles the operation of the renvoi doctrine.[315] In other words, the noncontractual court is required to assess the prospective outcome of litigation if the dispute were to be resolved by the contractual forum.

In *Bonny*, the agreement itself provided for the application of English law, and the Seventh Circuit assumed, without discussion, that this choice-of-law clause would be enforced by the English court.[316] If, however, the agreement in *Bonny* did not include a choice-of-law clause, the Seventh Circuit would have made a choice-of-law determination according to English conflicts rules. Only then would the court be able to determine the prospect of litigation in the designated forum, and whether the law applied would be repugnant to American public policy.

It is possible that the designated forum, in accordance with its choice-of-law rules, will apply the federal or state law of the United Sates to the controversy.[317] Would such an outcome ren-

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314. *See also* Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1364-66 (2d Cir. 1993).

315. The renvoi doctrine is a legal device utilized by some jurisdictions in the choice-of-law process when it is required to apply the law of another jurisdiction. Should such an application include the choice-of-law rules of the other jurisdiction as well as its municipal laws? If the forum is also required to refer to the foreign jurisdiction's choice-of-law rules, thus recognizing renvoi, in essence it is handling the dispute just as the foreign court would have. It is at this stage that the choice-of-law mode of operation of the public policy exception and the renvoi doctrine interact. For a thorough overview of the doctrine see SCOLES & HAY, *supra* note 29, at 67-72.

316. English conflict-of-law rules recognize the effectiveness of choice-of-law clauses. Farquharson, *supra* note 6, at 88-93.

317. In terms of the renvoi doctrine, such a reference is called remission.

der the forum clause invalid as against public policy? The Seventh Circuit, in *Omron Healthcare, Inc. v. Maclaren Exports Ltd.*,[318] answered in the negative. In *Omron*, a British manufacture, Maclaren, and an American distributor, Omron, designated the High Court of Justice in England to have exclusive jurisdiction concerning all disputes that arose between them.[319] In spite of the forum clause, Omron initiated its action in a United States district court claiming trademark infringements on the part of Maclaren.[320] In response to Maclaren's motion to dismiss the suit on the basis of the forum selection clause, Omron argued that litigation in England would offend the public policy of the United States.[321] Omron reasoned that American policy dictates that disputes should be sent to courts that have expertise to resolve them and that laws designed for the protection of American consumers should be interpreted by courts that have the interest of Americans at heart.[322] The Seventh Circuit dismissed the public policy contention. In its decision, the Seventh Circuit assumed that the applicable law was that of the United States even though England was selected in the forum selection clause. To the Seventh Circuit, the fact that an English court would apply United States federal trademark law did not constitute an impediment.[323] The court made it clear that not every dispute applying the laws of the United States must be decided by a court of the United States.[324]

Therefore, the noncontractual forum, when considering the choice-of-law mode of the public policy exception to the enforcement of an exclusive forum selection clause, must make a choice-of-law determination as made in the designated forum. If the law applicable in the selected forum is founded upon immoral or illegal standards, an American court will hold the forum selection clause invalid as against public policy.[325] However, this proposition is true only if there is some meaningful relationship between

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SCOLES & HAY, *supra* note 29, at 67. If reference is made to a third jurisdiction, it is called transmission. *Id.*

318. 28 F.3d 600 (7th Cir. 1994).

319. *Omron*, 28 F.3d at 601-02.

320. Omron contracted with Maclaren to distribute baby strollers manufactured by Maclaren. *Omron*, 28 F.3d at 601. Maclaren terminated the agreement and retained possession of 2,300 strollers that had the trademarks of both Omron and Maclaren. *Id.* Maclaren attempted to conceal the Omron trademark and this sparked the trademark infringement action brought by Omron. *Id.*

321. *Omron*, 28 F.3d at 603.

322. *Id.*

323. *Id.* at 602.

324. *Id.* at 603-04.

325. *Id.*

the controversy and the forum asked to enforce the forum agreement. As already pointed out, if the relationship between the controversy and the forum scores poorly on the intensity of relationship test, the court will be less willing to apply its legal standards and norms instead of those of the designated forum.

VI. CONCLUSION

It is evident that public policy continues to influence the enforcement of forum selection clauses. Although the doctrine no longer opposes the concept of forum agreements, it managed to carve out room for itself after American courts reconciled with the concept of forum agreements and encouraged party autonomy in dispute resolution.

Traditionally, the public policy doctrine has been disliked simply because it was too broad for confinement. Indeed, public policy is far from being a simple concept to grasp. However, when examined through defined legal concepts, the doctrine is much more manageable. As public policy has been compared to an "unruly" horse, the horse would be tamer if it were brought within the confines of a stable. The purpose of this article was to do just that. After pointing out the different modes in which public policy operates in the context of forum agreements and the factors relevant to its assessment, it is hoped that the doctrine is more workable and is not as vague and uncertain as it has been traditionally considered.